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Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the 'New Critics'

by Robert A. Sedler*

INTRODUCTION

This year marks the twentieth anniversary of the publication of the late Brainerd Currie's collected writings on the conflict of laws.¹ Twenty years have also passed since the decision of the New York Court of Appeals in *Babcock v. Jackson*,² which ignited the 'modern revolution' of choice of law in this country. The coincidence of the publication of Currie's collected writings and the decision in *Babcock* is, in retrospect, quite significant. The governmental interest approach formulated by Currie has indeed been the catalyst of the choice of law revolution and continues to be the focal point of the debate over the preferred approach to choice of law. Although this debate continues apace and a number of other 'modern approaches' to choice of law have been developed,³ *in practice* the courts that have abandoned the traditional approach⁴ generally employ interest

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1. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

2. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

3. For a review of these approaches, see R. SEDLER & R. CRAMTON, *SUM AND SUBSTANCE OF CONFLICT OF LAWS* §§ 5.0000-.4000, 7.0000-.4000 (2d ed. 1981).

4. My current count, in alphabetical order, indicates that of the fifty states and the District of Columbia, thirty-one have adopted a modern approach, at least in torts cases. Twenty-seven had done so by 1977. See *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968); *Schwartz v. Schwartz*, 103 Ariz. 562, 447 P.2d 254 (1968); *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967); *First Nat'l Bank v. Rostek*, 182 Colo. 437, 514 P.2d 314 (1973); *Gaither v. Myers*, 404 F.2d 216 (D.C. Cir. 1968); *Ingersoll v. Klein*, 46 Ill. 2d

analysis to resolve choice of law problems regardless of which 'modern approach' to choice of law they are purportedly following.⁵ Moreover,

42, 262 N.E.2d 593 (1970); *Witherspoon v. Salm*, 142 Ind. App. 655, 237 N.E.2d 116 (1968), *rev'd on other grounds*, 251 Ind. 575, 243 N.E.2d 876 (1969); *Berghammer v. Smith*, 185 N.W.2d 226 (Iowa 1971); *Wessling v. Paris*, 417 S.W.2d 259 (Ky. 1967); *Jagers v. Royal Indem. Co.*, 276 So. 2d 309 (La. 1973); *Beaulieu v. Beaulieu*, 265 A.2d 610 (Me. 1970); *Pevoski v. Pevoski*, 358 N.E.2d 416 (Mass. 1976); *Schmidt v. Driscoll Hotel Co.*, 249 Minn. 376, 82 N.W.2d 365 (1957); *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968); *Kennedy v. Dixon*, 439 S.W.2d 173 (Mo. 1969); *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963); *Pfau v. Trent Aluminum Co.*, 55 N.J. 511, 263 A.2d 129 (1970); *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Issendorf v. Olsen*, 194 N.W.2d 750 (N.D. 1972); *Fox v. Morrison*, 25 Ohio St. 2d 193, 267 N.E.2d 405 (1971); *Brickner v. Gooden*, 525 P.2d 632 (Okla. 1974); *Casey v. Manson Constr. & Eng'g Co.*, 247 Or. 274, 428 P.2d 898 (1967); *Griffith v. United Air Lines*, 416 Pa. 1, 203 A.2d 796 (1964); *Woodward v. Stewart*, 104 R.I. 290, 243 A.2d 917, *cert. dismissed*, 393 U.S. 957 (1968); *Marra v. Bushee*, 447 F.2d 1282 (2d Cir. 1972) (predicting Vermont choice of law rules); *Werner v. Werner*, 84 Wash. 2d 360, 526 P.2d 370 (1974); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). *See also* Sedler, *Rules of Choice of Law Versus Choice-of-Law Rules: Judicial Method in Conflicts Torts Cases*, 44 TENN. L. REV. 975 (1977) [hereinafter cited as Sedler, *Rules*] (a comprehensive analysis of the choice of law methods of American courts in torts cases). By 1979, two more states had abandoned the traditional approach. *See Wallis v. Mrs. Smith's Pie Co.*, 261 Ark. 622, 550 S.W.2d 453 (1977); *Gutierrez v. Collins*, 583 S.W.2d 312 (Tex. 1979); Sedler, *On Choice of Law and the Great Quest: A Critique of Special Multistate Solutions to Choice-of-Law Problems*, 7 HOFSTRA L. REV. 807 (1979) [hereinafter cited as Sedler, *Critique*]. Florida adopted a modern approach in 1980. *See Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999 (Fla. 1980). The most recent states to abandon the traditional approach are Hawaii, Idaho, and Michigan. *See Peters v. Peters*, 63 Hawaii 653, 634 P.2d 586 (1981); *DeMeyer v. Maxwell*, 103 Idaho 327, 647 P.2d 783 (1982); *Sexton v. Ryder Truck Rental*, 413 Mich. 406, 320 N.W.2d 843 (1982). Sixteen states continue to adhere to the traditional approach. *See Spencer v. Malone Freight Lines*, 292 Ala. 582, 298 So. 2d 20 (1974); *Landers v. Landers*, 153 Conn. 303, 216 A.2d 183 (1966); *Friday v. Smoot*, 58 Del. 488, 211 A.2d 594 (1965); *Wardell v. Richmond Screw Anchor Co.*, 133 Ga. App. 378, 210 S.E.2d 854 (1974); *McDaniel v. Sinn*, 194 Kan. 625, 400 P.2d 1018 (1965); *Brady v. State Farm Mutual Auto. Ins. Co.*, 254 Md. 598, 255 A.2d 427 (1969); *Lorenzen v. Continental Baking Co.*, 180 Neb. 23, 141 N.W.2d 163 (1966); *First Nat'l Bank v. Benson*, 89 N.M. 481, 553 P.2d 1288 (1976); *Petrea v. Ryder Tank Lines*, 264 N.C. 230, 141 S.E.2d 278 (1965); *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964); *Heidemann v. Rohl*, 86 S.D. 250, 194 N.W.2d 164 (1972); *Winters v. Maxey*, 481 S.W.2d 755 (Tenn. 1972); *Rhoades v. Wrih*, 622 P.2d 343 (Utah 1980), *cert. denied*, 454 U.S. 897 (1981); *McMillan v. McMillan*, 219 Va. 1127, 253 S.E.2d 662 (1979); *Chase v. Greyhound Lines*, 195 S.E.2d 810 (W. Va. 1973); *Duke v. Housen*, 589 P.2d 334 (Wyo.), *cert. denied*, 444 U.S. 863 (1979); Sedler, *Rules*, *supra* at 975-76 n.2. Two states, Montana and Nevada, have not directly addressed the issue. *See Sedler, Rules*, *supra* at 975-76 n.2.

5. *See* the discussion of this point in Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 227-33 (1977) [hereinafter cited as Sedler, *Governmental Interest Approach*]. For the practice of the courts in conflicts cases, *see also* the discussion in Leflar, *Choice of Law: A Well-Watered Plateau*, 41 LAW & CONTEMP. PROBS. 10 (1977). Professor Leflar maintains that "[m]ost of the current cases follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results

when presented with what Currie terms the 'true conflict'—the situation in which the forum and the other involved state both have a real interest in applying their own law in order to implement the policy reflected in that law⁶—the forum, again regardless of its purported approach to choice of law or its purported method of resolving true conflicts, generally will end up applying its own law, as Currie advocates.⁷ To put it another way, the *results* reached by the courts in the cases coming before them for decision are generally consistent with the interest analysis approach to choice of law as developed by Currie and refined by his followers.⁸

As a follower and staunch defender of Currie's interest analysis approach, I have previously responded to what may be called the standard criticisms of interest analysis, such as the alleged difficulty in determining the policies and interests of the involved states,⁹ the failure to take account of policies other than those expressed in substantive law rules,¹⁰ the supposed ad hoc nature of the approach,¹¹ and the claimed illegitimacy of the forum's preference for its own policies and interests in the case of the true conflict.¹² I have also contended that interest analysis has been empirically demonstrated to be the preferred approach to choice of law because the courts, who are in fact applying that approach, generally reach functionally sound and fair results in the cases coming before them for decision.¹³ Professor Kay has recently made a similar defense of interest analysis as a basic approach to the resolution of choice of law problems.¹⁴

The 'old critics' have not been persuaded and continue to press their attacks, both on interest analysis as a basic approach to choice of law and

which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law." *Id.* at 10.

6. Concerning the matter of "real interests," see the discussion in Sedler, *Governmental Interest Approach*, *supra* note 5, at 222-27.

7. *Id.* at 231-33.

8. For my own reformulation of Currie's interest analysis for use by the courts in the day-to-day process of deciding actual cases, see *id.* at 220-36.

9. *Id.* at 194-204. See also the discussion in Sedler, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1628, 1631-35 (1981) [hereinafter cited as Sedler, *Reflections*].

10. Sedler, *Governmental Interest Approach*, *supra* note 5, at 192-94. See also *infra* text accompanying notes 124-150.

11. *Id.* at 208-16. For a discussion of the resolution of conflicts problems on a case by case method in relation to judicial method, see generally Sedler, *Babcock v. Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws*, 56 Ky. L.J. 27, 82-87 (1967) [hereinafter cited as Sedler, *Judicial Method*].

12. Sedler, *Governmental Interest Approach*, *supra* note 5, at 227-33.

13. Sedler, *Reflections*, *supra* note 9, at 1628-31. See also the discussion in Sedler, *Critique*, *supra* note 4, at 808-13.

14. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CALIF. L. REV. 577 (1980).

on the principle of forum preference.¹⁵ More significantly, within the last few years 'new critics' have appeared. They have advanced new arguments challenging the underlying rationale of interest analysis and have sought to demonstrate that interest analysis is not "tenable"¹⁶ as a basic approach to the resolution of choice of law problems. Professor McDougal has developed an approach of "comprehensive interest analysis,"¹⁷ which, unlike Currie's interest analysis, is designed to take into account and accommodate all relevant interests, and to develop trans-state solutions to conflicts problems. Professor Brilmayer maintains that interest analysis is based on "constructive legislative intent" and contends that "constructive legislative intent" cannot be relied upon to provide sound solutions to choice of law problems.¹⁸ Dean Ely, a leading constitutional scholar, says that interest analysis is premised on a state's preference for its own residents,¹⁹ and has subjected this aspect of interest analysis to constitutional scrutiny. He says that it may not be able to withstand such scrutiny and that if it cannot, interest analysis cannot survive as a basic approach to choice of law.²⁰

My intention in the present writing is to respond to these 'new critics'

15. For a representative sampling, see generally Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644, 1659-64 (1981); Reese, *American Trends in Private International Law: Academic and Judicial Manipulation of Choice of Law Rules in Torts Cases*, 33 VAND. L. REV. 717, 719-24 (1980); Rosenberg, *The Comeback of Choice-of-Law Rules*, 81 COLUM. L. REV. 946, 947-51 (1981); Trautman, *Concluding Remarks*, 32 HASTINGS L.J. 1678, 1679-80 (1981); Trautman, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1612, 1614-16 (1981); Twerski, *On Territoriality and Sovereignty: System Shock and Constitutional Choice of Law*, 10 HOFSTRA L. REV. 149, 158-68 (1981); von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27, 32-39 (1977).

16. The term "tenable" was used by the editors of the Hastings Law Journal in propounding the questions for its Dialogue: Does an approach "create a tenable method for deciding choice-of-law issues?" *Reflections on Conflict-of-Laws Methodology: A Dialogue*, 32 HASTINGS L.J. 1609, 1610 (1981). I find the term particularly helpful in referring to the validity of a basic approach to the resolution of choice of law problems.

17. The two works that I will refer to in the present article are McDougal, *Comprehensive Interest Analysis Versus Reformulated Governmental Interest Analysis: An Appraisal in the Context of Choice-of-Law Problems Concerning Contributory and Comparative Negligence*, 26 U.C.L.A. L. REV. 439 (1979) [hereinafter cited as McDougal, *Comprehensive Interest Analysis*]; McDougal, *The New Frontier in Choice of Law—Trans-State Laws: The Need Demonstrated in Theory and in the Context of Motor Vehicle Guest-Host Controversies*, 53 TUL. L. REV. 731 (1979) [hereinafter cited as McDougal, *The New Frontier*]. See also McDougal, *Choice of Law: Prologue to a Viable Interest-Analysis Theory*, 51 TUL. L. REV. 207 (1977); McDougal, *The Process of Trans-State Agreement: Claims Concerning Oral Agreements*, 24 N.Y.L. SCH. L. REV. 367 (1978).

18. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980).

19. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173 (1981).

20. *Id.* at 180-91.

and in the process of so doing to demonstrate precisely why interest analysis is the preferred approach to the resolution of choice of law problems.

I maintain that interest analysis is the preferred approach because it will provide functionally sound and fair solutions to the choice of law issues that arise in actual cases.²¹ I focus on the matter of functionally sound and fair solutions to the choice of law issues that arise in actual cases because of my view of the purpose of conflicts law and the role of a court in deciding a conflicts case.

It is my view that the purpose of conflicts law is to provide functionally sound and fair solutions for those *relatively few cases* that arise in practice in which a court has to make a choice of law decision. A court has to make a choice of law decision in an actual case only when (1) the case is connected with more than one state *and* (2) the laws of the involved states differ on the point in issue.²² These cases are relatively few in number for two reasons. First, despite the fact that we live in a multistate world, most transactions, and thus most cases that arise in practice, are connected with only one state. Second, even when a case is connected with more than one state, most of the time the laws of the involved states will not differ on the point in issue. I am fond of saying that the law is alike except where it is different. With few exceptions, conflicts cases arising in American courts are interstate cases,²³ and a conflict between differing common-law rules of two American states in an actual case is virtually nonexistent.²⁴ Whenever a conflict of laws exists between two American states, it is almost invariably because one state has enacted a

21. See *supra* note 13.

22. I use the two-state example because almost invariably this is what is involved in an actual case. In the rare case in which three states are involved, two of the state's laws on the point in issue will be the same. See *Reich v. Purcell*, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

23. I consider a case involving an American state and a Canadian province essentially an interstate case. Because most of the conflicts cases arising in American courts are interstate cases, American conflicts law has developed with reference to the interstate case. International cases are accommodated within the framework established for interstate cases, although presumably relevant differences would be taken into account by the court. See, e.g., *Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974). Cf. *Loebig v. Larucci*, 572 F.2d 81 (2d Cir. 1978) (New York law applied in the absence of proof of contrary German law).

24. Such a conflict was assumed for purposes of the particular case in *Barrett v. Foster Grant Co.*, 450 F.2d 1146 (1st Cir. 1971), in which the court assumed a difference between the New Hampshire and Massachusetts common-law rules on the duties owed by a landowner to a visitor on the land. The assumption was that New Hampshire imposed a higher duty of care than that embodied in the general common-law rule. The court held that Massachusetts law applied, so it was not necessary to decide whether in fact there was a difference between the common-law rules of the involved states. I have not come across any other examples of even a possible difference in applicable common-law rules.

statute that changes the common-law rule remaining in force in the other state, for example, the guest statute situation²⁵ or in an area regulated by statute, such as wrongful death, a situation in which the statutes of the involved states differ in material respects. Even when a case is connected with more than one state, therefore, in practice the case usually will not present a choice of law issue. Thus, there simply will be relatively few conflicts cases in practice.²⁶

The conflicts cases that do arise are not inherently difficult to decide. The great majority of these cases are in the torts area, and for reasons that I have explained elsewhere, the cases tend to fall into certain fact-law patterns.²⁷ There is relative agreement among the courts on how the choice of law issues should be resolved in each fact-law pattern, and the courts have reached fairly uniform results in these cases regardless of the particular modern approach to choice of law that they purportedly follow.²⁸ Conflicts contracts cases also can be put into certain fact-law patterns,²⁹ and the cases that arise in practice tend to involve recurring problems, such as the statute of frauds, built-in limitation periods, and claims of usury. Conflicts cases in the property area are virtually nonexistent. Thus, not only are there relatively few conflicts cases that arise in practice, but those that do arise involve a limited number of choice of law issues.

For all of these reasons, I submit that the focus of conflicts law should be on the cases that actually do arise in practice and that the purpose of conflicts law should be to provide functionally sound and fair solutions in those cases. The real world in which conflicts law operates is all too often ignored by academic commentators. I have always believed that academic commentators tend to take an unduly complex view of the choice of law process³⁰ and tend to have a rather grandiose conception about the function of conflicts law in our legal system. This tendency may explain in

25. When a court adopts comparative negligence as a common-law rule, there would be conflict between common-law rules if the other state retained the traditional common-law rule of contributory negligence. Since comparative negligence, however, generally is provided for by statute, this is akin to a difference between a statute that changes the common-law rule and the remaining common-law rule in the other state.

26. In the typical accident or contract case that cuts across state lines, there will be no conflicts problems because the applicable substantive law involves general principles of negligence or contract law. The laws of the involved states, therefore, will not differ on the point in issue.

27. Sedler, *Rules*, *supra* note 4 at 980-81.

28. *Id.* at 1032-41.

29. *Id.* at 980 n.29.

30. This complex view of the choice of law process sometimes carries over to the courts when they provide a rationale for their choice of law decisions. Opinions in conflicts cases—perhaps because these cases are so rare—tend to be written as if each case were a landmark decision.

part the aversion of so many of them to interest analysis as a basic approach to the resolution of conflicts problems. Interest analysis will generally produce functionally sound and fair results in practice because it *simplifies* the choice of law process by focussing on what seems to the courts to be the most *rational* consideration in making choice of law decisions: the policies reflected in a state's rule of substantive law and a state's interest in applying its law to implement those policies in the particular case.³¹ My submission, then, is that interest analysis is the preferred approach to the solution of conflicts problems because it facilitates the court's task in reaching functionally sound and fair solutions in actual cases. It is within this framework that I will respond to the 'new critics.'

I. THE 'NEW CRITICS'

A. McDougal: *Comprehensive Interest Analysis*

Professor McDougal says that the interest analysis approach, both as originally developed by Currie and as I have reformulated it, is conceptually inadequate because it fails to "consider sufficiently *all* relevant interests at stake in choice-of-law controversies."³² He goes on:

[B]oth [Currie's original approach and my reformulation] give undue deference to the law of the forum; both fail to recognize that courts should and must weigh competing and conflicting interests; and both fail to provide for the development and application of trans-state laws when such laws are essential to an appropriate accommodation of the interests at stake in particular choice-of-law controversies.³³

McDougal then states his position on the importance of multistate interests:

The states in this country are not isolated political and economic units; they are an inextricably interwoven community. Each state, and all states, will benefit in the long run from the promotion of these multistate

31. It will be recalled that the underlying justification for interest analysis as developed by Brainerd Currie was that it would provide *rational* solutions to choice of law problems. Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 171-78, reprinted in B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, 177, 177-84 (1963) [hereinafter cited as Currie, *Methods and Objectives*]. [Editor's Note: Since most of Currie's articles are reprinted in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, a corresponding page reference to this work will appear throughout this article in brackets immediately after the citation to the appropriate page in Currie's originally published article.]

32. McDougal, *Comprehensive Interest Analysis*, *supra* note 17, at 440 (emphasis in original).

33. *Id.*

policies. Because these multistate policies, and the interests they reflect, are so important, a choice-of-law theory should require their identification and consideration in every choice-of-law controversy.³⁴

Given McDougal's premise that "choice-of-law decisions should be made with reference to multistate policies and all the policies and interests of the involved states,"³⁵ the Currie version of interest analysis is necessarily inadequate (1) because it looks only to the policies reflected in the substantive laws of the involved states and the interest of each state in applying its law to implement those policies; (2) because it contains an undue preference for forum law, in that forum law applies whenever the forum has a real interest in applying its law in order to implement the policy reflected in that law; (3) because it does not provide for a weighing of conflicting interests; and (4) because it does not provide for trans-state solutions going beyond the application of the substantive rule of one of the involved states.³⁶

Under McDougal's comprehensive interest analysis, a court presented with a choice of law issue should proceed as follows. First, it should identify *all* relevant interests of the "significantly affected" states.³⁷ These interests include not only the policies reflected in rules of substantive law, but common interests of all states that are "relevant to trans-state events"³⁸ and interests "expressed in terms of applicable community goals and policies."³⁹ Next, the court should examine all identified interests to make sure that "none is incompatible with basic community policies."⁴⁰ Finally, the court should make an "accommodation of all relevant interests in a manner that will best promote net aggregate long-term common interests."⁴¹ This accommodation may include applying a legal rule to the resolution of the controversy that is independent of the particular substantive law rules of either of the involved states. As McDougal contends: "If the laws designed to resolve intrastate controversies are unnecessarily destructive of the interests at stake, then the court should construct or ascertain another law that will appropriately accommodate the interests at stake and apply such a trans-state law."⁴²

McDougal has illustrated the application of comprehensive interest analysis in the areas of contributory fault and the guest statute defense.

34. *Id.* at 449.

35. *Id.* at 451.

36. *Id.* at 447-53.

37. He prefers this phrase to the phrase, "involved states," which I use. *Id.* at 454 n.70.

38. *Id.* at 454 n.73.

39. *Id.* at 455.

40. *Id.*

41. *Id.* at 456.

42. *Id.*

In both instances, after applying comprehensive interest analysis, he concludes that the preferred trans-state solution is to allow the plaintiff to recover. In the area of contributory fault, he would allow recovery on the basis of defendant's degree of negligence,⁴³ and in the guest statute situation, he would deny the defense.⁴⁴ The preferred trans-state solution would allow recovery, even if recovery would be barred under the laws of both the involved states.⁴⁵ As he puts it: "[C]ourts should strive to resolve these controversies in a manner that will best promote net aggregate long-term common interests; the application of intrastate laws of particular states may not produce such decisions in trans-state controversies."⁴⁶

The essential premise of McDougal's comprehensive interest analysis approach and his criticism of Currie's interest analysis for not accepting that premise raise most strikingly the question of the proper role of a court in a conflicts case and the purpose of conflicts law in our legal system. McDougal's premise is that choice of law decisions should be made with reference to "multistate policies," "all the policies and interests of the involved states," and "common interests of all states that are relevant to trans-state transactions."⁴⁷ This premise relates to his view of the purpose of conflicts law in our legal system, and here he adopts the view set forth in the Restatement Second: "Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them."⁴⁸

As stated at the outset of this writing, I disagree completely with McDougal's view of the purpose of conflicts law in our legal system. The purpose of conflicts law is not to further harmonious relations and to facilitate commercial intercourse between states, nor is it to promote multi-state policies. It is, as I have said, to provide functionally sound and fair results in those relatively few cases arising in practice that are connected with more than one state when the laws of the involved states differ on the point in issue.

43. The party who was more at fault, for example, the party who was 60% negligent, would pay 60% of the damages suffered by the other party. *Id.* at 470-73.

44. Such a solution, says McDougal, "promotes the exclusive and inclusive interests in rehabilitating victims whose injury is the product of another's negligent conduct and the exclusive and inclusive interests in minimizing unauthorized conduct." McDougal, *The New Frontier*, *supra* note 17, at 753-54.

45. In this circumstance, recovery would be denied under interest analysis and any other approach to the resolution of conflicts problems.

46. McDougal, *Comprehensive Interest Analysis*, *supra* note 17, at 473.

47. *Id.* at 453-57.

48. *Id.* at 448-49 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 comment d (1971)).

The reason that the purpose of conflicts law is not as grandiose as McDougal believes is that the decisions of courts in conflicts cases will have no effect whatsoever on harmonious relations between states or on commercial intercourse between them precisely because these cases are so few in number. Even assuming the existence of multistate policies, those policies will in no way be impaired if they are not taken into account in deciding what law to apply in a conflicts case.

Let me illustrate this point by a consideration of the practical effect of the oft-criticized case of *Lilienthal v. Kaufman*.⁴⁹ There, it will be recalled, the Oregon court, explicitly following Currie's interest analysis, applied the Oregon spendthrift immunity rule to protect an Oregon spendthrift from liability on a contract made in California with a California plaintiff. The case has been criticized as improperly defeating the expectations of the California creditor and ignoring the multistate policies of encouraging commercial transactions.⁵⁰ Regardless of whether these criticisms are well taken, one may ask what the practical effect of the decision in *Lilienthal* will be on harmonious relations between California and Oregon or on commercial intercourse between residents of Oregon and residents of California. The answer is obvious: *It will have no effect whatsoever.* In terms of normal commercial behavior, the situation presented in *Lilienthal* was an aberration. Very few people in Oregon are likely to be declared spendthrifts, and of those who are, very few would be able to induce someone in California or elsewhere to enter into commercial transactions with them. Californians will not be hesitant to deal with Oregonians because of the extremely remote possibility that the Oregonian may turn out to be a spendthrift. At most, they will be more careful when they run credit checks on potential Oregon contractors.⁵¹ And surely no one could say with a straight face that "harmonious relations" between California and Oregon will be adversely affected by a decision rendered by an Oregon court in a case that is unlikely ever to arise again. The grandiose conception about the purpose of conflicts law that Professor McDougal proffers simply has no relation to the real world. The decision of a court in a particular conflicts case, or for that matter, all the decisions of all the

49. 239 Or. 1, 395 P.2d 543 (1964).

50. See, e.g., D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 192 (1965); Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1597 (1978); von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1975). I maintain that *Lilienthal* was correctly decided. See the discussions in Sedler, *Governmental Interest Approach*, *supra* note 5, at 231; Sedler, *Characterization, Identification of the Problem Area, and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUT.-CAM. L. REV. 8, 80-81 (1970) [hereinafter cited as Sedler, *Characterization*].

51. In *Lilienthal* a credit check had been run, but it had failed to turn up any evidence of the debtor's incompetency. Currie, *Comments on Reich v. Purcell*, 15 U.C.L.A. L. REV. 595, 603-04 (1968).

courts in all the conflicts cases that arise, will have no effect at all on "harmonious relations between states" or on "commercial intercourse between them." The cases are simply too few in number to make any difference.⁵²

So much of the conflicts literature and academic efforts to develop new approaches to choice of law proceed on a grandiose conception of the purpose of conflicts law in our legal system. Little if any effort is made, however, to explain the basis for this grandiose conception or to assess the practical effect of courts' decisions in conflicts cases on the considerations that the academic commentators deem important.

Perhaps the academic commentators may be able to learn something from the behavior of the courts in conflicts cases. If we look to what the courts *do* in conflicts cases, it is clear that they see the purpose of conflicts law to provide functionally sound and fair results in those relatively few conflicts cases coming before them for decision. The courts simply have not evidenced any concern for promoting multistate policies and have not indicated that they see their decisions in a conflicts case as having any impact on harmonious relations between states or facilitating commercial intercourse or accommodating the interests of the interstate and international legal order. They have not done so because they do not share the academic commentators' grandiose conception of the purpose of conflicts law in our legal system or the role of the court in a conflicts case. In a conflicts case, as in any other, the courts' primary concern is with achieving a functionally sound and fair result in the particular case.

Lilienthal is a good example of the courts' behavior in a conflicts case. In an earlier domestic case involving the same defendant, the Oregon court had held that the contracts of a person declared to be a spendthrift could be avoided by the guardian.⁵³ The consequences of imposing liability would be felt by the spendthrift and his family in Oregon, regardless of whether the contract was centered in California or Oregon and regardless of whether plaintiff was an Oregonian or Californian. Since, in terms of the policies sought to be implemented by Oregon's rule of spendthrift immunity, Oregon's interest in applying its law to implement those policies was the same in the conflicts case as in the domestic case, it seemed quite reasonable to the Oregon court to apply its own law in the conflicts

52. In a similar vein, Professor Reese has taken me to task for advocating that the forum should apply its own law to allow recovery to a forum resident injured in an out-of-state accident involving a defendant from a nonrecovery state. Professor Reese says that if this view were followed, it would "inevitably result in an increase in insurance rates throughout the country as a whole." Reese, *supra* note 15, at 724. It would not have this effect, simply because the number of such cases "throughout the country as a whole" are too few to have a statistically significant effect on insurance rates in the aggregate.

53. *Olshen v. Kaufman*, 235 Or. 423, 437-38, 385 P.2d 161, 164 (1963).

case as well. The result is in no sense unfair to the California creditor, whose surprise at being unable to enforce the contract probably was no greater than that of the disappointed Oregon creditor. One party to a transaction always takes the risk that the other party to the transaction will turn out to be incompetent, and since the California creditor knew that defendant was an Oregonian,⁵⁴ it was foreseeable at the time of the transaction that defendant might turn out to be incompetent under Oregon law. Thus, the result in *Lilienthal* certainly was a reasonable result for the Oregon court to reach, in light of Oregon's interest in applying its law to implement the policy reflected in that law and the absence of unfairness to defendant resulting from the application of Oregon law in the particular case.⁵⁵

The courts, then, view their role in a conflicts case to be achievement of a functionally sound and fair result in the case before them and see the purpose of conflicts law to be directed toward that objective. The emphasis is on the case before the court. In some conflicts cases, a concern for achieving a functionally sound and fair result will dictate that the forum's own law be displaced on one or more issues in the case. This will occur primarily when the forum has no real interest in applying its law on the point in issue. When the forum has no real interest in applying its own law on a particular point and another state does, the application of the forum's law would not be considered to produce a functionally sound result in that case.⁵⁶ The application of the forum's law would not produce a fair result in a particular case if the party against whom the law is sought to be applied could not have foreseen the application of that law at the time the act in question occurred. In the cases that arise in practice, however, the same circumstances that would make the application of the forum's law fundamentally unfair usually will indicate that the forum

54. The creditor even ran an ineffective credit check on him in Oregon.

55. On the other hand, if an Oregon party entered into an oral contract with a California party, to be performed entirely in California, and the Oregon party sought to avoid enforcement of the contract on the ground that it violated the Oregon statute of frauds, the application of Oregon law on this issue would be fundamentally unfair to the California party. The statute of frauds represents a transaction-regulating policy, and a state's interest in applying its statute of frauds to implement that policy is predicated on substantial connections with the underlying transaction. The California party, entering into a contract connected entirely with California, would have no reason to anticipate the application of the law of the other party's home state on this issue. In such a situation, Oregon would have no interest in applying its statute of frauds to implement the transaction-regulating policy reflected in that law and would not do so. See the discussion of this point in Sedler, *Characterization*, *supra* note 50, at 83-84.

56. In actual practice, there are numerous cases in which the forum has not applied its own law on the ground that it had no real interest in doing so, while another state did. This illustrates the classic 'false conflict' situation. See the discussion and examples in Sedler, *Governmental Interest Approach*, *supra* note 5, at 223-27.

has no real interest in applying its law on the point in issue, and choice of law decisions generally are not based on fundamental unfairness grounds.⁵⁷

The fundamental problem with McDougal's comprehensive interest analysis, then, is that it proceeds on an erroneous view of the purpose of conflicts law in our legal system and of the proper role of the court in a conflicts case. Precisely because it proceeds on this erroneous assumption, it cannot help but produce results that the courts will and should consider to be functionally unsound. This point is illustrated by McDougal's "preferred trans-state solution" to questions of comparative fault and guest statute liability. It may well be, as McDougal says, that to allow recovery based on comparative fault and without regard to guest passenger status will advance some notion of multistate policies by "maximally promot[ing] the exclusive and inclusive interests [both] in minimizing unauthorized conduct"⁵⁸ and, within the confines of the existing loss distribution system, in rehabilitating victims. To advance multistate policies, however, is simply not the responsibility of a court in a conflicts case. Its responsibility is to achieve a functionally sound and fair result in the case before it. If both the plaintiff and the defendant are from a contributory fault state and the accident occurs in either of their home states or in another contributory fault state, a functionally sound and fair result *in that case* is to deny recovery to the victim. Since all of the involved states agree on the substantive result in this case and since the same result would obtain in a purely domestic case in either state, it would not appear to a court to be functionally sound to arrive at a different result merely because the parties reside in different contributory fault states.

Comprehensive interest analysis, as proposed by McDougal, completely misperceives the purpose of conflicts law and the role of the court in a conflicts case. For that reason, it will not and should not be accepted by the courts.

Interest analysis, on the other hand, recognizes that the purpose of conflicts law is to provide functionally sound and fair results in those conflicts cases that come before the courts for decision. It focusses on the particular case and on the policies and interests of the involved states, as they appear in that case. Precisely because interest analysis as a basic approach is congruent with what the courts see to be the purpose of conflicts law and their proper role in a conflicts case, interest analysis is in practice applied by the courts to resolve the choice of law problems that come before them.

57. See the discussion of this point in Sedler, *Governmental Interest Approach*, *supra* note 5, at 222.

58. McDougal, *Comprehensive Interest Analysis*, *supra* note 17, at 472.

B. Brilmayer: *The Matter of "Constructive Legislative Intent"*

Professor Brilmayer's criticism of interest analysis as a basic approach to choice of law revolves around the matter of "constructive legislative intent."⁵⁹ She says that interest analysis is based on a claim of "fidelity to legislative intent"⁶⁰ and that since actual legislative intent usually cannot be determined,⁶¹ interest analysis must of necessity "fall back on constructive intent."⁶² According to her, "constructive legislative intent" means that "a rational legislature would, upon reflection, prefer the results of interest analysis to those of competing conflicts methodologies."⁶³ She then seeks to demonstrate that "the features that have made interest analysis unpalatable to many commentators—in particular, its unpredictability and parochialism—also leave it unconvincing as a species of constructive intent."⁶⁴

Professor Brilmayer contends that legislators want the scope of application of the laws they enact to be "predictable" and that legislatures do not enact laws based only on favoritism for forum residents.⁶⁵ In addition, she argues that "domestic interpretation and conflicts interpretation are different enterprises altogether."⁶⁶ Finally, she notes that whenever legislatures have specified the application of a statute in the interstate context, they generally have taken a territorialist approach.⁶⁷ Professor Brilmayer concludes:

When a legislature has not indicated the territorial scope of a statute in either the words enacted or in the legislative history, it is a fiction to speak of "legislative intent." If my analysis of what the calculus of interests requires is erroneous, the interest analysts should clarify the a priori principles upon which their theory necessarily rests. Even better, they would do well to cease making extravagant claims about fulfilling legislators' wishes, and get to work on a theory of constructive interpretation that at least comports with demonstrated legislative concerns.⁶⁸

I think that Professor Brilmayer simply misapprehends the nature of the

59. Brilmayer, *supra* note 18.

60. *Id.* at 392.

61. *Id.* at 393. This is because, as she says, "in the vast majority of cases, legislatures have no actual intent on territorial reach." *Id.* (emphasis in original). I would agree.

62. Brilmayer, *supra* note 18, at 393.

63. *Id.*

64. *Id.* at 402.

65. See her discussion, *id.* at 402-17.

66. *Id.* at 417.

67. See her discussion, *id.* at 424-29. For a similar view from the perspective of a law professor who is also a state legislator, see Davies, *A Legislator's Look at Hague and Choice of Law*, 10 HOFSTRA L. REV. 171, 174-82 (1981).

68. Brilmayer, *supra* note 18, at 430-31.

interest analysis approach. When the nature of that approach is properly understood, it is clear that the approach is in no sense based on constructive legislative intent.

In contending that interest analysis is based on constructive legislative intent, Professor Brilmayer cites certain statements made by Currie, but she ignores completely the context in which those statements were made. She puts parts of two quotations together, and it comes out as follows: "It is explicitly an attempt to determine legislative purposes [T]he method I advocate is the method of statutory construction."⁶⁹ From these pieced-together snippets, Professor Brilmayer has concluded that interest analysis is necessarily premised on "fidelity to legislative intent."⁷⁰

Now let us see what Currie said in its entirety, with the quotation taken by Professor Brilmayer in italics. First, there is the "method of statutory construction." Here, Currie was responding to a criticism by Professor Hill,⁷¹ and Currie's full response was as follows:

To one of Mr. Hill's charges I plead guilty without reservation. In the first sentence of his essay he attributes to me the proposal that traditional methods of choice of law be abandoned in favor of a method "involving the effectuation of relevant governmental policies on what appears to be an *ad hoc* basis." "*Ad hoc*" has a deprecatory connotation that was no doubt intended. *But the method I advocate is the method of statutory construction*, and of interpretation of common-law rules, to determine their applicability to mixed cases. While there are some general principles to guide us, statutory construction must always be an *ad hoc* process. The distinctive virtue of the common-law system is that it also proceeds on an *ad hoc* basis. I am proud to associate myself with the common-law tradition. We have too long supposed that conflict-of-laws problems can be solved in accordance with a code, transplanted from the continent of Europe, which takes no account of the policies involved in statutes and rules, nor even of the content of the laws that are competing for recognition. It is time to return to methods that are indigenous to our legal system and that our judges and lawyers are fully competent to utilize by reason of their training and experience.⁷²

69. *Id.* at 392 n.1 (quoting Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L.J. 1, 40 [690, 727] [hereinafter cited as Currie, *Conflict, Crisis and Confusion*] and Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258, 295 [584, 627] (1961) [hereinafter cited as Currie, *Quiescent Years*]).

70. Brilmayer, *supra* note 18, at 392.

71. Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960).

72. Currie, *Quiescent Years*, *supra* note 69, at 295 [627] (emphasis added). For a discussion of the judicial method in conflicts cases, see Sedler, *Judicial Method*, *supra* note 11, at 82-87.

As the above discussion makes clear, Currie's use of the term "method of statutory construction" was in the context of identifying the *policies* contained in a statute, in the same manner as identifying the policies contained in a common-law rule in order to determine the applicability of both statutes and common-law rules to "mixed cases." It is simply astonishing to me how Professor Brilmayer could rely on the above passage for the proposition that "[p]roponents of 'governmental interest analysis' have marketed their theory as a species of legislative interpretation, indeed as the definitive approach to construing legislative intent"⁷³ or could conclude, based on that passage, that interest analysis is based on the premise that "a rational legislature would, upon reflection, prefer the results of interest analysis to those of competing methodologies."⁷⁴ Currie said nothing about trying to determine whether the legislature demonstrably or constructively intended for the statute to apply to a particular case containing a foreign element and certainly said nothing about legislative preference for a particular approach to choice of law. He was explaining how *courts* should decide conflicts cases, and as the above passage makes clear, interest analysis is equally applicable to policies reflected in common-law rules.

Now let us consider the statement: "It is explicitly an attempt to determine legislative purposes."⁷⁵ Here, Currie was comparing the governmental interest approach with the 'grouping of contacts' approach.⁷⁶ Let us put the statement in context:

Governmental-interest analysis determines the relevance of the relationship by inquiring whether it furnishes a reasonable basis for the state's assertion of an interest in applying the policy embodied in its law. Its methodology—while no one would claim for it ease of application,⁷⁷ or complete objectivity, or more precision than we ordinarily find in legal reasoning—is at least the familiar one of construction and interpretation. That methodology permits, and requires, a statement of the reasons why a state's relationship to the case is thought to be significant. The statement is sufficiently objective to be susceptible of objective criticism. *It is explicitly an attempt to determine legislative purpose*, and if that purpose is misinterpreted, legislative correction is invited. The process of "grouping contacts" has none of these features. It deals in broad general-

73. Brilmayer, *supra* note 18, at 392.

74. *Id.* at 393.

75. *Id.* at 392 n.1 (quoting Currie, *Conflict, Crisis and Confusion*, *supra* note 69, at 40 [727]).

76. This is the approach originally adopted by the Restatement (Second) of Conflict of Laws without the policy content of § 6.

77. I would submit that in light of the experience with the interest analysis approach in the years since Currie wrote, it can indeed be claimed that the method provides 'ease of application.'

ities about the "interest" of a state in applying its law without inquiry into how the "contacts" in question relate to the policies expressed in specific laws.⁷⁸

Interest analysis is indeed an "attempt to determine legislative purpose" in the sense that legislative purpose refers to the *policies* embodied in a statute or, to put it another way, to the objective that the legislature was trying to accomplish by the enactment of the statute.⁷⁹ Interest analysis operates exactly the same way when a common-law rule is involved, but it has nothing whatsoever to do with "legislative intent."

Professor Brilmayer simply has got it all wrong. She has launched a sweeping attack on interest analysis as a basic approach to choice of law based on a complete—one might almost say deliberate—misconception of what interest analysis is all about. Interest analysis is in no sense based on legislative intent, either actual or constructive. Under interest analysis, the court makes the choice of law decision with reference to the policies embodied in the laws of the involved states and the interest of each state, in light of those policies, in having its law applied on the point in issue in the particular case. When the policy behind a rule of substantive law would be advanced by its application in the particular case, that state is deemed 'interested' in having the rule applied, and the court is not concerned, if the rule is embodied in a statute, with whether the legislature 'intended' that the statute apply in the particular case.⁸⁰

Legislative intent is relevant in the choice of law context only when the legislature has *manifested* its intent for the applicability of a law it has enacted to a situation containing a foreign element. As I have discussed more fully elsewhere,⁸¹ the legislature may have imposed directives on the applicability of a statute to a situation containing a foreign element, and, if so, the courts of the enacting state are bound by those directives. Thus, if the forum's legislature has directed, either expressly or as a matter of demonstrable intention,⁸² that the statute shall be applied to a par-

78. Currie, *Conflict, Crisis and Confusion*, *supra* note 69, at 39-40 [727-28] (emphasis added).

79. See the discussion in Sedler, *Governmental Interest Approach*, *supra* note 5, at 194-201.

80. The court is not concerned with determining legislative intent precisely because, as Professor Brilmayer says: "In the vast majority of cases, legislatures *have* no actual intent on territorial reach," or more precisely, on the application of a statute to a particular situation containing a foreign element. Brilmayer, *supra* note 18, at 393 (emphasis in original). When there is such an intent, it will be manifested in a statutory directive on the statute's applicability in those situations. See generally, R. SEDLER & R. CRAMTON, *supra* note 3, at § 3.2000.

81. See generally Sedler, *Functionally Restrictive Substantive Rules in American Conflicts Law*, 50 S. CAL. L. REV. 27 (1976) [hereinafter cited as Sedler, *Restrictive*].

82. For discussion of determination of demonstrable legislative intention, see *id.* at 51.

ticular situation containing a foreign element, the forum must apply the statute to that situation, totally apart from choice of law considerations.⁸³ Conversely, when the statute, by its own terms or as a matter of demonstrable legislative intention, is inapplicable to a situation containing a foreign element, the forum court *cannot* apply the statute, again totally apart from choice of law considerations.⁸⁴ In most cases, however, the legislature will not have expressed itself one way or another, and the forum court must determine the applicability of its statute to a situation containing a foreign element in the same manner as it determines the applicability of its own common-law rules. Under interest analysis, the decision on the applicability of a statute, like the decision on the applicability of a common-law rule, is made with reference to the policy embodied in the statute and the interest of the state, in light of that policy, in applying the statute to the particular situation containing a foreign element.

As the above discussion makes clear, interest analysis is not premised on 'fidelity to legislative intent' and in fact has nothing to do with legislative intent. The interest analysts, contrary to Professor Brilmayer's assertions, have not made "extravagant claims about fulfilling legislators' wishes."⁸⁵ They have not made any claims about fulfilling legislators' wishes at all. Their claim is that choice of law decisions should be made with reference to the policies embodied in rules of substantive law, whether statutes or common-law rules, and the interests of the involved states in having their laws applied to implement those policies in the particular case.

The soundness of interest analysis as a basic approach to choice of law cannot be challenged by contending that it proceeds on a premise on which in fact it does not proceed. Thus, Professor Brilmayer's 'fundamental criticism' is completely irrelevant.

Professor Brilmayer also makes some specific criticisms of interest analysis as a basic approach to choice of law, to which I also want to respond. These are that interest analysis is "unpredictable" and that domestic interpretation and conflicts interpretation are different enterprises altogether.⁸⁶

Professor Brilmayer says that interest analysis allows unpredictable re-

83. This statement assumes, of course, that such application would be constitutional. A good example of a statutory directive for the application of the forum's statute is U.C.C. § 1-105 (1972), in which the forum is directed to apply its version of the Uniform Commercial Code to all transactions "bearing an appropriate relation" to the forum.

84. See the discussion in Sedler, *Restrictive*, *supra* note 81, at 44-60.

85. Brilmayer, *supra* note 18, at 431.

86. *Id.* at 393. Professor Brilmayer also charges that interest analysis is based on "parochialism," *id.* at 393, a criticism that I will deal with in responding to Dean Ely's criticism in the same vein. See *infra* text accompanying notes 164-193.

sults in that persons who act in reliance on one state's laws "may be unfairly surprised by application of another's."⁸⁷ She says that one cause of this unpredictability is the assumption that when a law embodies both a regulatory policy and a compensatory policy, either would suffice to justify application of forum law. The forum would have an interest in applying its law to implement the compensatory policy whenever a forum resident was injured, but the defendant may not have known that a forum resident could be injured at the time the defendant acted. But, she says, in enacting a statute that embodies a regulatory policy, a legislature "manifests a belief that most people will change their behavior in contemplation of the law."⁸⁸ She concludes: "It seems unjust to apply such a law to persons who could have had no notice of the applicable standards, since the legislature could not have expected them to change their conduct to conform."⁸⁹

So far, everything that Professor Brilmayer has said is unexceptional. As I have emphasized many times, fairness to the parties is an independent choice of law consideration.⁹⁰ A state will not—and constitutionally cannot—apply its own law in any situation in which to do so would be fundamentally unfair to the party against whom the law is sought to be applied.⁹¹ If a party could not reasonably be expected to conform its conduct to the standards imposed by the law of a particular state, then it would be fundamentally unfair to apply those standards to that party despite the forum's interest in doing so. Predictability relates to fundamental fairness, however, only in the sense that it means *foreseeability*. The application of a state's law to govern the conduct of a party must have been *foreseeable to a party at the time the party acted*. If interest analysis allowed unpredictable results in the sense that it allowed the application of a state's law to a party who could not have foreseen such application at the time the party acted, those results would not only be unsound, they would be unconstitutional. No reported case can be found, however, in which a court following interest analysis, or any other approach, has allowed such a result, and Professor Brilmayer cites none. Like many of the other critics, she postulates hypothetical cases that have

87. Brilmayer, *supra* note 18, at 402.

88. *Id.* at 403.

89. *Id.*

90. See, e.g., the discussion in Sedler, *Governmental Interest Approach*, *supra* note 5, at 222: "It should be noted, of course, that in any choice of law case, considerations of fairness to the parties is an independent value. A court will not make a choice of law decision that would be fundamentally unfair to either or both parties."

91. For a discussion of the constitutional stricture of "fundamental fairness," see Sedler, *Constitutional Limitations on Choice of Law: The Perspective of Constitutional Generalism*, 10 HOFSTRA L. REV. 59, 89-92 (1981) [hereinafter cited as Sedler, *Constitutional Limitations*].

never arisen and says that they could be decided under interest analysis in a way that would produce an unpredictable result. But even here, she misapplies interest analysis.

She begins with a dramshop act example. She notes correctly that dramshop acts embody both a compensatory and a regulatory policy and says that "[i]f either of the two policies is a sufficient basis for applying a dramshop act, then civil liability is appropriate whenever the sale occurs within the state or a state resident is injured."⁹² She then goes on: "Interest analysis would thus seem to imply that if while on vacation in a state with no dramshop act, a forum resident is hit by an auto careening out of a local bar's parking lot, then he may return home, sue, and recover from the tavern owner."⁹³ There is one rather fundamental problem with this example: it could not, as stated, arise in the real world. Assuming that the local bar was doing business only in that state and was not located in proximity to the victim's home state, there would be no way that such a case could be brought constitutionally in the victim's home state.⁹⁴ Thus, this example of an allegedly unpredictable result produced by interest analysis simply could not happen.

For the sake of argument, however, I will change the facts to posit an example that could arise in the real world and that would raise that issue of unpredictable result. A resident of Minnesota, which has a dramshop act, is vacationing in Nevada, which does not. The accident occurs in the parking lot of a national restaurant chain, which serves alcoholic beverages. Since that chain has a number of establishments in Minnesota, it can constitutionally be subject to suit there on the basis of forum-defendant contacts. The Minnesota plaintiff brings suit in Minnesota to recover under the Minnesota dramshop act. Professor Brilmayer says that interest analysis would imply that the plaintiff could recover against the restaurant.

She is clearly mistaken. Despite Minnesota's interest in applying its dramshop act to implement the compensatory policy reflected in the law, it will not do so here because the application of the Minnesota dramshop act to the conduct of the restaurant in Nevada was not *foreseeable* at the time that alcoholic beverages were served to the intoxicated patron in Nevada. It was not foreseeable because of the distance between Minnesota and Nevada; the bartender in Nevada could not foresee that the serving of alcoholic beverages to an intoxicated patron in Nevada would cause harm in Minnesota, and in fact it did not cause harm in Minnesota.⁹⁵ The

92. Brilmayer, *supra* note 18, at 403 (emphasis in original).

93. *Id.*

94. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

95. Cf. *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978), *cert. denied*, 444 U.S. 1070 (1980), in which the Wisconsin tavern was located in a city on the Wisconsin-Minnesota

foreseeable ambit of harm was limited to Nevada, and under Nevada law no liability was imposed. Thus, while Minnesota has an interest in applying its law in this case in order to implement the compensatory policy reflected in that law, based on the victim's Minnesota residence, the Minnesota court will not—and constitutionally cannot⁹⁶—apply its law on that basis because *in this case* the application of Minnesota law was not foreseeable to the Nevada actor at the time the act took place.

Professor Brilmayer says that “[i]nterest analysts . . . are not noted for their fondness for foreseeability tests.”⁹⁷ I do not really understand what she means by this point, and it is difficult to see its relevance. Fairness is an independent choice of law consideration, and the forum does not apply its own law, despite a real interest in doing so, when the application of its law would be fundamentally unfair to the party against whom it is sought to be invoked. In the tort context, the application of a state's law to impose liability against a defendant is fundamentally unfair only if the application of that law could not have been foreseen by the defendant at the time the act took place. As I have stated elsewhere:

On the other hand, *foreseeability* does come into play most prominently in tort cases in the sense that subjecting a party to a particular kind of liability in particular circumstances must have been reasonably foreseeable so that the party could be expected to insure against such liability or to bear the consequences of the failure to do so.⁹⁸

In our example, the restaurant that served alcoholic beverages to an intoxicated patron was located in a state that did not have a dramshop act. Subjecting the restaurant to dramshop liability simply because the victim was a resident of a state that had a dramshop act was not foreseeable to the restaurant, and the national chain could not reasonably be expected to insure against dramshop liability for the actions of *this* restaurant.

border close to an interstate exit. In addition, taverns in Wisconsin could stay open six hours later than taverns in Minnesota. In these circumstances, it was likely that a number of the tavern's late night customers would be Minnesotans. It was thus foreseeable that the service of liquor to an intoxicated patron at *this tavern* could cause an accident in Minnesota. On this basis, the Minnesota court held that the tavern constitutionally could be subject to long-arm jurisdiction in Minnesota and applied Minnesota law allowing recovery. See also *Young v. Gilbert*, 121 N.J. Super. 78, 296 A.2d 87 (1972), in which a tavern was located in New York seven miles from the New Jersey state line and New Jersey youths between eighteen and twenty-one could purchase alcoholic beverages in New York, but not in New Jersey. Under these facts, the tavern could be constitutionally subject to suit in New Jersey for injuries caused by a New Jersey resident who had become intoxicated at the tavern.

96. The lack of foreseeability would render it fundamentally unfair for Minnesota to apply its law here, and such fundamental unfairness would be violative of the due process clause.

97. Brilmayer, *supra* note 18, at 404.

98. R. SEDLER & R. CRAMTON, *supra* note 3, § 9.0000 (emphasis in original).

Therefore, under interest analysis—or any other approach to choice of law—dramshop liability under Minnesota law would not and constitutionally could not be imposed in this case.

We may compare our example case with *Bernhard v. Harrah's Club*.⁹⁹ In *Bernhard*, the application of the California dramshop act to the conduct of this Nevada tavernkeeper was fully foreseeable because of the proximity of the tavern to the California state line and its regular and frequent patronage by Californians. While the tavern extensively advertised in California, the result should have been no different if the tavern had not advertised, given its proximity to the California state line and its regular and frequent patronage by Californians.¹⁰⁰ Because of the proximity and the regular and frequent patronage, the tavern could foresee that if it served alcohol to an intoxicated patron, the patron could cause an accident in California as well as in Nevada. Therefore, the imposition of liability under the California dramshop act against this Nevada tavernkeeper did not produce an unpredictable result.¹⁰¹

It is difficult to see what Professor Brilmayer means when she says that interest analysis allows unpredictable results in that persons who act in reliance on one state's laws "may be unfairly surprised by the application of another's."¹⁰² In the example she has given in support of this contention, after it was altered so that it could arise in the real world, liability would not be imposed precisely because the imposition of such liability was not foreseeable at the time the actor acted. She completely ignores the fact that fairness is an independent choice of law consideration and that under interest analysis, the forum will not apply its own law, despite a real interest in doing so, when the application of its law would be fundamentally unfair to the party against whom it is sought to be invoked. In the cases that arise in practice, fundamental unfairness has not been a problem. Either the defendant did not act in reliance on one state's laws¹⁰³ or the application of the law of the forum imposing liability was fully foreseeable to the defendant at the time he acted.¹⁰⁴ In this regard,

99. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, cert. denied, 429 U.S. 859 (1976).

100. See *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1978); *Young v. Gilbert*, 121 N.J. Super. 78, 296 A.2d 87 (1972).

101. Professor Brilmayer uses *Bernhard* as the starting point for her hypothetical case but does not indicate any disagreement with the result in *Bernhard* itself. See Brilmayer, *supra* note 18, at 406.

102. *Id.* at 402.

103. An example of this would arise when a plaintiff from a recovery state is injured by a nonrecovery-state defendant in a nonrecovery state and the plaintiff's home state, where the defendant is subject to jurisdiction on the basis of forum-defendant contacts, applies its own comparative negligence law to allow recovery. See, e.g., *Schwartz v. Consolidated Freightways*, 300 Minn. 487, 221 N.W.2d 665 (1974).

104. This was the situation in *Bernhard* and in *Blamey v. Brown*, 270 N.W.2d 884

then, Professor Brilmayer clearly has not demonstrated that interest analysis allows unpredictable results.

Professor Brilmayer then says that interest analysis can produce unpredictable results in that, if there is no way of determining in advance whether particular conduct will be covered by a statute, residents and nonresidents alike are put to a difficult choice between foregoing conduct that may later turn out to have been permissible and risking sanctions. She notes that this is the typical vagueness problem and says that if people are unaware of the penalties because the possibility of applying the statute seems too remote, then such application surprises individuals after the fact.¹⁰⁵ I would not dispute these points, but I fail to see what they have to do with the question of whether interest analysis can produce unpredictable results. Perhaps she is making these points in connection with the alleged difficulty in determining policies and interests, an argument to which I have responded elsewhere.¹⁰⁶ In any event, the matter of determining in advance whether particular conduct will be covered by a statute—the vagueness problem—is something quite different from the matter of determining whether a state's law will be applied to a situation that contains a foreign element under interest analysis.

To support her contention here, Professor Brilmayer has posited an example of a state law that requires manufacturers of lawnmowers to install a special safety guard and provides that noncompliance shall be negligence per se. A resident manufacturer diligently complies with the statute when manufacturing lawnmowers to be sold within the state, but, in order to avoid being put at a competitive disadvantage, does not install the safety shield on mowers manufactured for use in other states. She asks if the forum would apply the statute if the person injured in an out-of-state accident turns out to be a resident and says that it is unlikely that an interest analysis scholar or court would go that far. But, she asks, "if not, why not?"¹⁰⁷

I submit that the statute should be applied to impose liability on the resident manufacturer whether the victim is a resident or a nonresident. The policy embodied in this statute is purely a regulatory one, and the forum's interest in applying its law to implement that policy is predicated on the fact that the conduct the law sought to regulate—the manufacture of the lawnmower—occurred in the forum.¹⁰⁸ Since the lawnmower was

(Minn. 1978).

105. Brilmayer, *supra* note 18, at 407.

106. See Sedler, *Governmental Interest Approach*, *supra* note 5.

107. Brilmayer, *supra* note 18, at 404.

108. For a discussion of a state's interest in applying its law in order to implement regulatory and admonitory policies, see Sedler, *Governmental Interest Approach*, *supra* note 5, at 202.

manufactured in the forum, it is irrelevant, as far as the forum's interest in applying its law to implement the policy reflected in that law is concerned, whether the accident occurred in the forum or elsewhere or whether the victim was a resident or a nonresident. It is also irrelevant, for the same reason, that the particular lawnmower was manufactured for use in another state. The legislature in enacting the law was concerned about regulating the manufacture of lawnmowers and did not distinguish between lawnmowers manufactured for use in the state and lawnmowers manufactured for use elsewhere. Perhaps it was just as concerned about the safety of nonresidents as it was about the safety of residents.¹⁰⁹ Perhaps it did not make an exception for lawnmowers manufactured for use elsewhere because it thought that there was the danger that such a lawnmower might be sold mistakenly in the local market. We cannot speculate about the *motivation* of the legislature in enacting the law. It enacted a law requiring that the shield be placed on all lawnmowers manufactured in the state, and its *purpose* in adopting the negligence per se rule was to deter manufacturers from trying to get away with manufacturing lawnmowers without the shield.¹¹⁰ Since the lawnmower in question was manufactured in the state, the policy to be implemented by the law will be advanced by its application in this case even though the accident involving the mower occurred in another state. For this reason also, the application of the negligence per se rule to the manufacturer in this case was fully predictable at the time of manufacture.

Professor Brilmayer says that "[s]urely all concerned are better off if there is a predictable basis for deciding which lawnmowers need shields."¹¹¹ Here, there is indeed a "predictable basis for deciding which lawnmowers need shields."¹¹² It is *all* lawnmowers *manufactured* in the forum, because the law by its terms is directed toward the manufacture of lawnmowers and makes no exception for lawnmowers manufactured in the forum for intended sale elsewhere.

The absence of unpredictability here is even more clear if we posit a 'vagueness' challenge to the law, which we will assume also imposes criminal penalties. Suppose the manufacturer defended the criminal charge on the ground that the particular lawnmower was intended for export, and to quote Professor Brilmayer, the manufacturer made the reasonable inference that "my state legislature would have no desire to regulate my sales

109. In this sense, it was being 'evenhanded.'

110. Critics of interest analysis tend to be confused about the difference between legislative purpose and legislative motivation. See the discussion in Sedler, *Governmental Interest Approach*, *supra* note 5, at 197-98.

111. Brilmayer, *supra* note 18, at 407.

112. *Id.*

in other jurisdictions.”¹¹³ The vagueness challenge is absurd because the *terms* of the statute are clear. The statute refers to all lawnmowers and makes no exception for lawnmowers intended for export to another state. The court theoretically could graft such an exception onto the statute, but it is not likely to do so. Most certainly, however, the manufacturer cannot claim ‘unfair surprise’ because the court chooses not to accept the exception that the manufacturer unilaterally read into the statute. If the manufacturer had consulted a lawyer in advance, the lawyer most assuredly would have advised against unilaterally reading such an exception into the statute.

Likewise, in the choice of law context, the application of the statute was fully foreseeable to the manufacturer at the time the lawnmower was manufactured. It was fully foreseeable because the conduct the law sought to regulate occurred in the forum. The application of the statute to impose liability on the manufacturer when the particular lawnmower was sold in another state without the required shield in no sense produces an unpredictable result. Professor Brilmayer thus has failed completely to substantiate her charge that interest analysis allows unpredictable results.

We may now consider Professor Brilmayer’s contention that “domestic interpretation and conflicts interpretation are different enterprises altogether.”¹¹⁴ Professor Brilmayer makes this contention in the context of challenging the “assumption” of interest analysis that “conflict-of-laws reasoning is no different from ordinary substantive interpretation of statutes.”¹¹⁵ According to her, interest analysts say that in both cases “the job is allegedly to determine whether the policies behind the statute make the statutory remedy appropriate in the particular case.”¹¹⁶ I will come back to the point of comparison shortly, but first I want to discuss Professor Brilmayer’s development of this contention.

Professor Brilmayer makes a number of theoretical points about the differences between “domestic interpretation” and “conflicts interpretation.” She talks about “conflicts preconditions” and “substantive preconditions” for the application of a state’s law in light of relevant and irrelevant connecting factors and relates these “preconditions” to the question of whether the forum legislature intends its law to apply.¹¹⁷ I must confess that I have some difficulty in seeing the relevancy of the points she is making to the question of whether there is a similarity between the process of determining policies and interests in the domestic context and the

113. *Id.* at 404.

114. *Id.* at 417.

115. *Id.*

116. *Id.*

117. *Id.* at 421.

process of determining policies and interests in the conflicts context.

To the extent that interest analysts draw a comparison between "domestic interpretation" and "conflicts interpretation," they do so to determine the policies behind a particular rule of substantive law and the interest of a state, in light of those policies, in applying that rule to a particular case containing a foreign element. There is indeed a similarity between the *process* of determining the policy behind a rule of law for the purpose of deciding on its application in a marginal domestic case—a case in which the rule is not clearly applicable—and determining the policy behind a rule of law for the purpose of deciding whether the state has a real interest in applying its rule in a case containing a foreign element. As I have put it:

Just as a court in a domestic case must decide whether a statute should be applicable to a situation not clearly within its terms, in a conflicts case a court must decide whether the application of a statute or common law rule in the circumstances presented effectuates the legislative purpose.¹¹⁸

To quote Professor Hancock: "Generally speaking, the court's basic task in a choice-of-law case is analogous to that in a wholly domestic case; it must decide whether or not an unforeseen set of facts comes within the policy range of a statutory or non-statutory domestic rule."¹¹⁹ We make this comparison primarily to show that just as it is not difficult to determine policy and interest in the domestic context, it is not difficult to determine policy and interest in the conflicts context either.¹²⁰

The similarity of the processes can be illustrated by the following examples of spousal immunity cases. In the purely domestic case, plaintiff and defendant were not married to each other at the time of the accident but married subsequently. The attorney for the insurance company, representing the nominal defendant, asserts the defense of spousal immunity. Here, the issue is whether the spousal immunity bar applies when the parties were not married at the time of the accident but married subsequently. In resolving that question, the court considers the policy behind the rule of spousal immunity and whether that policy will be advanced by its application to this particular domestic situation. Since a rule of spousal immunity can serve the policies of protecting marital harmony and conversely of preventing collusive suits against the insurer¹²¹

118. Sedler, *Governmental Interest Approach*, *supra* note 5, at 201. With a common-law rule, we would refer to the purpose of the court in adopting that rule.

119. Hancock, *Tort Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older Cases Revisited*, 18 U. TORONTO L.J. 331, 340 (1968).

120. See the discussion in Sedler, *Governmental Interest Approach*, *supra* note 5, at 201-04.

121. Both of these policies are legitimate. In some cases application of the rule could

and since those policies would be advanced by applying the rule to bar suits by parties who are married at the time of the suit but were not married at the time of the accident, the court is likely to hold that the spousal immunity bar applies in this marginal domestic case.¹²²

Now let us consider the question of spousal immunity in a conflicts case. Married parties who reside in State X, which retains the spousal immunity rule, are involved in an accident in State Y, which does not recognize spousal immunity. The injured party brings suit against the other spouse in State X.¹²³ Under interest analysis, the State X court must determine whether State X has a real interest in applying its rule of spousal immunity in this case with a foreign element. The court determines the policies behind the rule of spousal immunity just as it did in the marginal domestic case. Since any marital disharmony will be felt in State X and since the accident will be charged to the insurer's State X loss experience, the policies reflected in the rule of spousal immunity will be advanced by the rule's application in this case just as they would in a purely domestic case. The fact that the accident occurred in State Y is irrelevant, as far as the policy reflected in State Y's substantive rule is concerned, just as the fact that the parties were not married at the time of the accident was irrelevant, as far as the policy reflected in the rule of spousal immunity is concerned, in the purely domestic case.

In other words, by looking to the policies embodied in the rule of spousal immunity, a court determines both whether the rule should be applied in the marginal domestic case when the parties were not married to each other at the time of the accident and in the conflicts case when the accident occurred in another state. The process is exactly the same in both situations. In this sense, at least, domestic interpretation and conflicts interpretation are *not* 'different enterprises altogether.'

Even if Professor Brilmayer is correct in her contention that there are theoretical differences between domestic interpretation and conflicts interpretation, this contention is in no way relevant to the point of compar-

advance the policy of protecting marital harmony, such as when one spouse sues the other to recover for an intentional tort, while in other cases, it could advance the policy of preventing collusive suits against the insurer, such as in the typical accident. As Currie observed: "The business of courts in conflict-of-laws cases is not to judge the policies of the states, but to ascertain them and give them effect, so far as possible, when there is a legitimate basis for effectuating them." Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 STAN. L. REV. 205, 220 [128, 144] (1958).

122. Cf. *Kjeldsen v. Ballard*, 52 Misc. 2d 952, 277 N.Y.S.2d 324 (Sup. Ct. 1967).

123. This is not likely to happen today, because the plaintiff, knowing that State X is likely to apply its law to deny recovery, will bring suit in State Y, hoping that State Y will apply its own law. When suit has been brought in the home state on the mistaken assumption that the court would look to the law of the state of injury, that state has applied its own law to deny recovery. See, e.g., *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966).

ison between domestic interpretation and conflicts interpretation under the interest analysis methodology. As I have demonstrated, the process of determining policies and interests is exactly the same in both situations.

Professor Brilmayer's specific criticisms of the interest analysis approach, as well as her broad-based "constructive legislative intent" criticism, completely misapprehend how interest analysis works. She has labored to find weakness in the theory, but has paid scant attention to how interest analysis operates in practice. Most assuredly, she has not supported her contention by concrete examples showing that the interest analysis approach in fact produces functionally unsound or unfair results. It is thus difficult to take her criticisms very seriously.

C. Ely: Improper Preference for One's Own

Dean Ely, a leading constitutional scholar, has launched a constitutionally-based attack¹²⁴ on what he calls the state's interest in protecting its own.¹²⁵ He says that Currie's "basic methodological premise"¹²⁶ is that states are interested in protecting their own and that without this basic methodological premise, "interest analysis is largely impotent."¹²⁷ As a part of the state's interest in protecting its own, he goes on to say that "states are interested in applying their rules so as to generate victories for their own people in a way that they are not interested in generating victories for others."¹²⁸ Dean Ely then seeks to demonstrate that the premise that states have a greater interest in advancing the interests of their own residents than they have in advancing the interests of outsiders is constitutionally doubtful¹²⁹ and that if the premise is unconstitutional, then "the dominant contemporary choice-of-law theory is unconstitutional."¹³⁰ I will come back to the constitutional question later, but it is not the major part of my response to Dean Ely's criticism.

My primary response to Dean Ely's criticism is that he completely misunderstands the basic premise of interest analysis and the reasons that, in certain circumstances, a state's real interest in applying a rule of substantive law in order to implement the policies reflected in that law is limited to residents and does not extend to nonresidents. The basic premise of interest analysis most assuredly is not that "states are interested in protecting their own residents in a way they are not interested in protecting

124. Ely, *supra* note 19.

125. *Id.* at 173.

126. *Id.* at 175.

127. *Id.*

128. *Id.* at 178.

129. *Id.* at 179.

130. *Id.* at 186-87.

others”¹³¹ or that “states are interested in applying their rules so as to generate victories for their own people in a way that they are not interested in generating victories for others.”¹³² The basic premise of interest analysis is that choice of law decisions should be made with reference to a state’s interest in applying a rule of substantive law in order to implement the policy reflected in that law. This basic premise is completely unaffected by the matter of whether the party who will benefit from the application of a state’s law is a resident or a nonresident. If it is a nonresident who will benefit from the application of a state’s law in circumstances in which the state has a real interest in applying its law in order to implement the policy reflected in that law, the state’s interest in having its law applied is no less than it would be if the party who would benefit is a resident. The focal point of interest analysis is a state’s interest in applying its law in order to implement the policy reflected in that law, and the party who would benefit from the application of a state’s law—whether a resident or a nonresident—is deemed entitled to invoke such benefit in the choice of law context.

In support of his contention that ‘interest analysts’ say that “states are unusually interested in promoting the fortunes of their own people,”¹³³ Dean Ely quotes as typical one of my statements: “The plaintiff’s home state is interested in applying its own law allowing its resident to recover, while the defendant’s home state is equally interested in applying its own law to protect the defendant and the insurer.”¹³⁴ That statement was made in the context of analyzing a true conflict in which a plaintiff from a recovery state is injured by a defendant from a nonrecovery state in the defendant’s home state.¹³⁵ In the typical accident case, the relevant interests are compensatory and protective ones, and a state’s interest in applying its law in order to implement those policies indeed depends on a party’s residence in that state, *since the consequences of the accident and of imposing or denying liability will be felt by the parties and the insurer in the parties’ home state.*

In the situation to which I was referring, the plaintiff’s home state has a real interest in applying its law that allows the plaintiff to recover since the social and economic consequences of the accident will be felt by the plaintiff in that state. Conversely, the defendant’s home state has a real

131. *Id.* at 175.

132. *Id.* at 178.

133. *Id.*

134. *Id.* (quoting Sedler, *Rules*, *supra* note 4, at 1036).

135. The interests would be the same if the accident occurred in the plaintiff’s home state. No reported case has contained the latter situation, perhaps because there can be no doubt that in this situation the plaintiff’s home state would apply its own law to allow recovery.

interest in applying its law that denies recovery since the consequences of imposing liability will be felt by the defendant in that state and if the defendant is insured against liability, this accident will be charged to the insurer's loss experience in that state. The application of the law of each party's home state for the benefit of that party in this situation is not justified on the ground that "states are unusually interested in promoting the fortunes of their own people."¹³⁶ It is justified on the ground that in this particular fact-law pattern,¹³⁷ it is the fact of residency that gives rise to an interest in applying a state's law on the issue of tort liability, and for that reason, each state is interested in applying its law for the benefit of its resident party.

In a different fact-law pattern, implementation of the policy reflected in a state's rule of substantive law, under interest analysis, would require application of its law to enable a nonresident party to prevail over a resident party. As stated above, when a law reflects a compensatory or protective policy,¹³⁸ a state's interest in applying its law to implement that policy is usually predicated on a party's residence in that state since it is there that the consequences toward which the compensatory or protective policy is directed are likely to be felt. When a law, however, reflects a regulatory or admonitory policy, as has been discussed previously, a state's interest in applying its law to implement that policy is predicated on the connection between that state and the conduct sought to be regulated or prevented, totally apart from the residence of the actor or the victim. Dean Ely notes that states do have interests that "are indifferent to the residence of either or both parties to a lawsuit," but says that 'interest analysts' generally ignore such interests.¹³⁹ Here, Dean Ely is quite wrong. A state's interest in applying its law in order to implement a regulatory or admonitory policy reflected in that law is as much a part of

136. Ely, *supra* note 19, at 178.

137. As to the meaning of fact-law patterns, see Sedler, *Rules*, *supra* note 4, at 980-81.

138. Professor Brilmayer argues that laws reflecting compensatory and protective policies also have a regulatory effect in the sense that the legislature was aware that those laws would alter conduct. Brilmayer, *supra* note 18, at 405. For purposes of determining a state's interest in applying its law in order to implement the policy reflected in that law, however, we refer to a policy designed to regulate behavior or to deter conduct, totally apart from—rather than incidental to—any compensatory or protective policy reflected in that law. So, while Oregon's spendthrift immunity law involved in *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964), might have the incidental effect of influencing the conduct of contracting parties in Oregon, this was not the purpose behind the enactment of that law and the law reflects a protective, not a regulatory, policy. Oregon would have no interest, therefore, in applying its spendthrift immunity law to immunize a California spendthrift, whose contracts were not voidable under California law, from liability to an Oregon plaintiff on the ground that the contract between the parties was centered in Oregon. See the discussion of this situation in Sedler, *Characterization*, *supra* note 50, at 82-83.

139. Ely, *supra* note 19, at 194.

interest analysis as a state's interest in applying its law in order to implement a compensatory or protective policy reflected in that law. The application of a state's law to implement a regulatory or admonitory policy will sometimes have the effect of enabling a nonresident to prevail over a resident, and when it does have this effect, it completely belies the contention that "states are unusually interested in promoting the fortunes of their own people."¹⁴⁰

Perhaps the best example of this situation is the oft-discussed case of *Intercontinental Planning, Ltd. v. Daystrom, Inc.*¹⁴¹ There, a New York broker filed suit in New York against a New Jersey corporation to recover a finder's fee based on an alleged oral agreement. The transaction had significant factual connections with both states. The oral agreement was unenforceable under the New York statute of frauds but was valid under New Jersey law. Because of the significant factual connections that the transaction had with New York, New York had a real interest in applying its statute of frauds in order to implement the transaction-regulating policy reflected in that law.¹⁴² It did so and thus denied recovery to the New York plaintiff against the New Jersey defendant. It likewise would seem that New Jersey, on the basis of the significant factual connections that the transaction had with New Jersey, would also have a real interest in applying its law allowing recovery in this case and therefore, under interest analysis, should hold for the New York plaintiff against the New Jersey defendant.¹⁴³ In this case, then, both states would have a real interest in applying their law, and the effect of the application of each state's law would be to favor the nonresident party over the resident party.

Most of the cases involving regulatory and admonitory policies arise in the tort area, and usually, in terms of interest analysis, they present a false conflict. The state where the prescribed conduct occurred has a real interest in applying its law in order to implement the regulatory or admonitory policy reflected in that law, and the other involved state ordina-

140. *Id.* at 178.

141. 24 N.Y.2d 372, 248 N.E.2d 576, 300 N.Y.S.2d 817 (1969).

142. For a discussion of the transaction-regulating policy reflected in the New York statute of frauds, see Sedler, *Critique*, *supra* note 4, at 827-31.

143. The New York court said that New Jersey had no interest in applying its law to allow recovery by a New York broker against a New Jersey principal and thus treated the case as a false conflict. 24 N.Y.2d at 385, 248 N.E.2d at 584, 300 N.Y.S.2d at 828. I took the same position at an earlier time and now realize that this was erroneous. As I have pointed out elsewhere, under Currie's interest analysis there is no reason to distinguish between the false conflict in which the forum is the only interested state and the true conflict in which the forum is one of the interested states, since in both situations Currie advocates application of the forum's own law. Sedler, *Governmental Interest Approach*, *supra* note 5, at 220-22.

rily has no interest in applying its law to shield the actor from liability.¹⁴⁴ When the victim is a nonresident and the actor is a resident, the effect of the application of the law of the state where the conduct occurred is to enable a nonresident to prevail over a resident. Some examples of this situation that have arisen in practice are illustrated in the following cases. In *Gaither v. Myers*,¹⁴⁵ a car was stolen in the District of Columbia. The thief injured the victim in Maryland. The owner of the car, a District of Columbia resident, had left his keys in the car. The District of Columbia's law, which imposed strict liability for any harm caused by leaving keys in a car, was applied here. In *Foster v. Day & Zimmerman, Inc.*,¹⁴⁶ the court used Iowa law to impose strict liability when a grenade, defectively manufactured in Iowa, led to an explosion at an Army base in Georgia and injured a Washington victim. Illinois law was used to impose liability in *Gravina v. Brunswick Corp.*¹⁴⁷ for invasion of privacy. This arose from the unauthorized use of the name and photograph in Illinois of a Rhode Island resident.¹⁴⁸ In *Rutherford v. Gray Line, Inc.*,¹⁴⁹ New York law imposing vicarious liability on the owner of a vehicle was held to embody a regulatory policy. It therefore applied to impose liability on a New York owner of a vehicle for the wrongful death of a Pennsylvania resident in New York.¹⁵⁰

As the cases make abundantly clear, interest analysis has nothing to do with enabling a resident party to prevail over a nonresident party. Interest analysis is premised on a state's interest in applying its law in order to implement the policy reflected in that law, and in some circumstances, the application of a state's law on this basis will enable a nonresident to prevail over a resident.

144. See the discussion of this point in Sedler, *Rules*, *supra* note 4, at 1038.

145. 404 F.2d 216, 223 (D.C. Cir. 1968).

146. 502 F.2d 867, 871 (8th Cir. 1974).

147. 338 F. Supp. 1, 7 (D.R.I. 1972).

148. Recovery did not appear to be authorized under Rhode Island law. The federal court, sitting as a Rhode Island state court, treated the case as a false conflict, with Illinois being the only interested state, and applied Illinois law. The Illinois court would have reached the same result if suit had been brought there.

149. 615 F.2d 944, 950 (2d Cir. 1980).

150. See also *Johnson v. Spider Staging Corp.*, 87 Wash. 2d 577, 583, 555 P.2d 997, 1002 (1976), in which the Washington court rather questionably saw its policy of allowing unlimited recovery in wrongful death actions as reflecting an admonitory policy and applied Washington law to impose unlimited liability against a Washington defendant when the negligent conduct in Washington resulted in the death of a Kansas resident in Kansas. Kansas law limited liability for wrongful death. The court thus characterized the case as a false conflict rather than as the unprovided-for case. If it had characterized the case as presenting the unprovided-for case, however, it is likely that Washington law allowing unlimited recovery likely would have been applied. See the discussion and review of cases in Sedler, *Rules*, *supra* note 4, at 1038-39.

Putting aside this completely inaccurate view of the basic premises of interest analysis, let us now consider what may be called Dean Ely's more restrained criticism of a "state's interest in protecting its own."¹⁵¹ He objects to the proposition that a state's compensatory and protective policies extend only to its residents and suggests that such preference for residents may be violative of the privileges and immunities clause.¹⁵² Professor Brilmayer makes the same criticism under the heading of "parochialism."¹⁵³ She uses the example of a forum that has a guest statute. In a negligence action brought by a resident passenger against a nonresident driver, who presumably is from a state that does not have a guest statute,¹⁵⁴ the defendant cannot claim the benefit of the forum's guest statute. If the nonresident, however, had been the passenger and the resident had been the driver, the forum would have an "interest"¹⁵⁵ in applying its guest statute. She concludes that under interest analysis, "the out-of-stater must pay if he is the driver but cannot collect if he is the passenger."¹⁵⁶

Let me first respond to the charge of parochialism levelled by Professor Brilmayer since, as we will see, the response also will be relevant to counter Dean Ely's constitutional argument. When the defendant is from a guest statute state and the plaintiff is from a recovery state, a true conflict is presented irrespective of where the accident occurred. In Professor Brilmayer's example, since suit was brought in the defendant's home state¹⁵⁷ and since that state has a real interest in applying its law in order to protect its defendants and their insurance companies, it will apply its own law to implement that protective policy.¹⁵⁸ In terms of interest analysis, when a defendant from a recovery state injures a plaintiff from a

151. Ely, *supra* note 19, at 173.

152. U.S. CONST. art. IV, § 2; Ely, *supra* note 19, at 181.

153. Brilmayer, *supra* note 18, at 408.

154. If the driver were from a state that had a guest statute, there would be no conflict of laws on the issue of guest-host immunity.

155. The quotation of "interest" is from Brilmayer, *supra* note 18, at 408.

156. *Id.*

157. In such a case, of course, the plaintiff will try to bring the suit in the plaintiff's home state, which would be possible if the transaction had some factual connections with that state, *see, e.g.*, *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972), or if the defendant were an enterprise doing business in that state, *see, e.g.*, *Schwartz v. Consolidated Freightways*, 300 Minn. 487, 221 N.W.2d 665 (1974).

158. There have been no cases involving this precise situation, probably because a plaintiff who cannot obtain jurisdiction over the defendant in the plaintiff's home state will not bring suit. For cases involving other defenses, such as limitations on wrongful death liability, *see Sedler, Rules, supra* note 4, at 1037-38. The rule of choice of law here is that when a plaintiff from a recovery state is injured by a defendant from a nonrecovery state and suit is brought in the defendant's home state, the defendant's home state will apply its own law and deny recovery.

guest statute state in the latter's home state, the unprovided-for case is presented: the plaintiff's home state has a policy of protecting defendants, and that policy will not be advanced by applying it in favor of out-of-state defendants since the consequences of imposing liability on the defendant and the insurer will not be felt in that state; conversely, the defendant's home state has a policy of protecting plaintiffs, and since all the consequences of the accident will be felt by the plaintiff in the home state, that policy will not be advanced by applying it to allow recovery to an out-of-state plaintiff injured in his home state. I have maintained that in this situation recovery should be allowed on the ground that both states have a common policy of allowing recovery, to which guest statute immunity represents an exception, and since the only state interested in allowing the exception does not do so, recovery should be allowed.¹⁵⁹ In practice, the courts have generally allowed the plaintiff to recover in this situation,¹⁶⁰ and we will assume that here the nonresident defendant will be denied the benefit of the forum's guest statute.

Professor Brilmayer is critical of this result, and her criticism focusses on the alleged lack of evenhandedness.¹⁶¹ She does not argue that recovery should be allowed or denied in either case, but only that the defendant should be treated the same way without regard to residence. Since interest analysis dictates that the forum apply its guest statute in favor of the resident defendant, the criticism of interest analysis here would have to be on the ground that it does not mandate that the guest statute will be applied in favor of the nonresident defendant as well.¹⁶² The failure to apply the guest statute in favor of the resident defendant, according to Professor Brilmayer, is "blatant parochialism."¹⁶³ She claims that "[i]t [blatant parochialism] jeopardizes a principle essential to the smooth functioning of federal systems: treating nonresidents as fairly as residents."¹⁶⁴

I will respond to the alleged lack of evenhandedness in the terms postulated by Professor Brilmayer. Does denying the benefit of the forum's guest statute to the nonresident defendant mean that the nonresident defendant is not being treated as *fairly* as the resident defendant? Where, I would ask, is the *unfairness* in refusing to give the nonresident defendant

159. Sedler, *Governmental Interest Approach*, *supra* note 5, at 233-36.

160. See the discussion and review of cases in Sedler, *Rules*, *supra* note 4, at 1038-39.

161. Brilmayer, *supra* note 18, at 408.

162. While the interest analysis methodology can identify the unprovided-for case, it cannot as such provide a means for its resolution, since by definition neither state has an interest in applying its law on the point in issue. To apply the guest statute in favor of the nonresident defendant, therefore, would not be inconsistent with interest analysis, but it is not required by interest analysis either.

163. Brilmayer, *supra* note 18, at 410.

164. *Id.*

the benefit of the forum's guest statute? This refusal is *unfair* only if we assume that *fair* treatment means *identical* treatment. It is not *unfair* to refuse to treat different defendants in an *identical* way *if there is a reasonable basis for the different treatment*. Here the basis for the different treatment of the resident defendant and the nonresident defendant is obvious. In the case of the nonresident defendant, the policy reflected in the guest statute will not be advanced; therefore, the forum has no interest in applying its guest statute to implement that policy.

Professor Brilmayer's criticism of interest analysis for its alleged lack of evenhandedness, at least in the context of this example, is somewhat circular. If interest analysis lacks evenhandedness in this example, it is only because in one case the forum has a real interest in applying its law in order to implement the policy reflected in that law and in the other case it does not. Since the premise of interest analysis is that courts should decide conflicts questions with reference to the policies and interests of the involved states, interest analysis cannot be faulted for an alleged lack of evenhandedness because it recognizes that in the case involving the resident defendant the forum has a real interest in applying its law in order to implement the policy reflected in that law and that in the case of the nonresident defendant, it does not have such an interest. The nonresident defendant is not being treated differently because of the fact of nonresidency, but because the fact of nonresidency means that the forum does not have a real interest in applying this particular rule of substantive law in favor of this defendant. A nonresident defendant would be treated unfairly in comparison to a resident defendant only if that defendant came from a guest statute state and the forum refused to give that defendant the benefit of guest statute immunity in a suit by a resident plaintiff, but it would give its resident defendant the benefit of its guest statute in a suit by a nonresident plaintiff. This, of course, would not happen: if both the plaintiff and the defendant were from a guest statute state, there would be no conflict of laws on the issue of guest-host immunity and the defense would be sustained.

In Professor Brilmayer's example, however, there is no lack of evenhandedness. There is a reasonable basis for the different treatment of resident defendants and nonresident defendants, namely that when the defendant is a resident, the forum has a real interest in applying its law in order to implement the policy reflected in that law, but when the defendant is a nonresident, it does not have such an interest. Unless it is somehow illegitimate for a court to make conflicts decisions with reference to the policies and interests of the involved states—which even Professor Brilmayer has not contended—interest analysis cannot be faulted for an alleged lack of evenhandedness.

We will use Professor Brilmayer's guest statute example to deal with Dean Ely's constitutional objection to a "state's interest in protecting its

own."¹⁶⁵ Dean Ely says that the privileges and immunities clause¹⁶⁶ prohibits a state from discriminating against nonresidents and that different treatment cannot be justified on the ground that the nonresident is limited to the protection provided by his home state. In support of this proposition, he relies primarily on *Austin v. New Hampshire*,¹⁶⁷ which invalidated a commuters' tax that applied to the New Hampshire-derived income of nonresidents but exempted the income of residents similarly earned within the state. Dean Ely says that it was irrelevant regarding the privileges and immunities violation that the net effect of the law was to tax an out-of-stater at the same rate imposed by the out-of-stater's home state.¹⁶⁸ He then concludes that the principle of *Austin v. New Hampshire* renders interest analysis unconstitutional insofar as it is based on a state's interest in protecting its own. Here I will let Dean Ely speak for himself:

Austin thus seems to stand rather directly for the proposition that it is not sufficient under the Privileges and Immunities Clause to treat people as the laws of their home states would treat them.

The importance of this conclusion should not be underestimated. If *Austin* is right as written, the dominant contemporary choice-of-law theory is unconstitutional. The threat is by no means simply to Brainerd Currie's dictum that in cases of true conflict the forum should apply its own law; the point is much more devastating. It undercuts the entire methodology by indicating that whenever a state would claim an interest in enforcing its protective policy on the ground that the party its law would protect is a local resident—and that much is common to all "interest" or "functional" analysts—it is obligated by the United States Constitution to claim a similar interest in protecting out-of-staters, irrespective of what their home states' law provides. That, for reasons we have canvassed, spells the end of "interest analysis" in any recognizable sense of the term.¹⁶⁹

Under Dean Ely's argument, in the guest statute example, the guest statute state, which claims an interest in protecting resident defendants, "would be obligated by the United States Constitution to claim a similar interest in protecting out-of-staters."¹⁷⁰

I think that Dean Ely's constitutional argument fails on two counts, and they are somewhat interrelated. First, I think he has read the privileges and immunities clause too broadly in regard to the matter of dis-

165. Ely, *supra* note 19, at 173.

166. U.S. CONST. art. IV, § 2.

167. 420 U.S. 656, 665 (1975).

168. Ely, *supra* note 19, at 186.

169. *Id.* at 186-87 (emphasis in original).

170. *Id.* at 187.

crimination against nonresidents. Second—perhaps because he completely misapprehends the basic premises of interest analysis—he finds discrimination against nonresidents in the choice of law context, when no such discrimination in fact exists.

The privileges and immunities clause does indeed prohibit discrimination against nonresidents. It has never been interpreted, however, as prohibiting all *distinctions* between residents and nonresidents. It prohibits what may be called invidious discrimination against nonresidents, that is, the different treatment of nonresidents simply because they are nonresidents and without regard to any reasonable basis of distinction between residents and nonresidents. The privileges and immunities clause does not prohibit reasonable distinctions between residents and nonresidents when the fact of residency or nonresidency is *relevant* to the matter in issue. For example, it cannot seriously be contended that it is a violation of the privileges and immunities clause for a state to require a nonresident plaintiff to post security for costs in a court action although a similar requirement is not imposed on resident plaintiffs.¹⁷¹

What a state may not do is to discriminate against nonresidents who are similarly situated to residents with respect to the matter in issue. Typical of such discrimination is the Alaska law invalidated in *Hicklin v. Orbeck*,¹⁷² which, to quote Dean Ely, “require[d] that local residents be hired in preference to equally qualified nonresidents for all local employment resulting from oil or gas leases.”¹⁷³

The discrimination invalidated by the court in *Austin* was blatant discrimination against nonresidents who were similarly situated to residents with respect to the matter in issue. Again to quote Dean Ely, the invalidated commuters’ tax “applied to the New Hampshire-derived income of nonresidents, but exempted the income of residents similarly earned within the state.”¹⁷⁴ This discrimination against nonresidents who were similarly situated to residents with respect to the matter in issue, solely because of their nonresidency, was not saved by the fact that the effect of the law was to treat people as the laws of their home state would treat them.¹⁷⁵ What rendered the tax unconstitutional, then, was the discrimination between residents and nonresidents who were similarly situated with respect to the matter in issue, and the otherwise unconstitutional discrimination was not saved on the ground that it incorporated the tax

171. See, e.g., *Brewster v. North Am. Van Lines*, 461 F.2d 649 (7th Cir. 1972); see also *Kreitzer v. Puerto Rico Cars, Inc.*, 417 F. Supp. 498 (D.P.R. 1975), *aff’d*, 535 F.2d 140 (1976).

172. 437 U.S. 518 (1978).

173. Ely, *supra* note 19, at 182.

174. *Id.* at 186.

175. *Id.*

rate of the nonresident's home state.

For constitutional purposes, then, the focus must be on whether the nonresident is similarly situated to the resident with respect to the matter in issue. In our guest statute example, it is clear that the nonresident defendant is not similarly situated to the resident defendant with respect to the availability of the guest statute defense. Since the policy behind a guest statute is to protect defendants and insurers from liability in guest passenger suits, and since the effect of imposing liability in such a suit is felt by the defendant and the insurer only in the defendant's home state, that state has a real interest in applying its guest statute to protect resident defendants and their insurers. Conversely, since the effect of imposing liability on a nonresident defendant and insurer in a guest passenger suit will not be felt by the defendant or insurer in the guest statute state, that state has no interest in applying its guest statute in favor of that defendant. The nonresident defendant is not being treated differently solely because he or she is a nonresident, but because the fact of residency is relevant to the matter in issue. In view of the policies embodied in a guest statute, a state's interest in applying its guest statute to implement those policies exists when the defendant is a resident but does not exist when the defendant is a nonresident. Thus, the resident defendant and the nonresident defendant are not similarly situated with respect to the matter in issue—the application of the forum's guest statute—and there is a reasonable basis for the different treatment of residents and nonresidents. The denial of the benefit of the forum's guest statute to the nonresident defendant, therefore, does not constitute discrimination against nonresidents within the meaning of the privileges and immunities clause.¹⁷⁶

In this regard, it is of no significance that the nonresident defendant is from a state that does not have a guest statute. The nonresident defendant is not being denied the benefit of the guest statute defense because his home state does not have a guest statute. It does not matter, therefore, as Dean Ely says, that "it is not sufficient under the Privileges and Immunities Clause to treat people as the laws of their home state would treat them."¹⁷⁷ The constitutional question relates to the assertion of the

176. I think it highly doubtful in any event that the Court, which has been unwilling to interpret the due process and full faith and credit clauses as imposing any significant limitations on the power of state courts to make choice of law decisions, see the discussion in Sedler, *Constitutional Limitations*, *supra* note 91, at 68-74, will find such limitations inhering in the privileges and immunities clause or the equal protection clause. See the discussion of this point in Sedler, *Interstate Accidents and the Unprovided for Case: Reflections on Neumeier v. Kuehner*, 1 *HOFSTRA L. REV.* 125, 143-49 (1973) [hereinafter cited as Sedler, *Interstate Accidents*].

177. Ely, *supra* note 19, at 186.

defense under the forum's guest statute.¹⁷⁸ The nonresident defendant is being denied the defense under the forum's guest statute because the policy reflected in that law will not be advanced by its application to a case involving this defendant. Since the different treatment of residents and nonresidents with respect to the applicability of the forum's guest statute is justifiable on the ground that the resident and nonresident defendants are not similarly situated with respect to the matter in issue, there is no violation of the privileges and immunities clause.

Dean Ely's attempt to 'unconstitutionalize' interest analysis as a basic approach to choice of law, therefore, must fail on its own terms. Even assuming, as Dean Ely says, that *Austin* stands for the proposition that it is not sufficient under the privileges and immunities clause to treat people as the laws of their home state would treat them, the nonresident defendant is not being denied the benefit of the forum's guest statute on the ground that the defendant's home state does not recognize guest-host immunity. The nonresident defendant is being denied the benefit of the forum's guest statute on the ground that the policy reflected in that statute will not be advanced by its application in the case of this defendant. In any event, there is no violation of the privileges and immunities clause to begin with unless there has been different treatment of nonresidents who are similarly situated to residents with respect to the matter in issue. Since nonresidents are not similarly situated to residents with respect to the forum's interest in applying its guest statute in order to implement the policy reflected in that law, the forum may, consistent with the privileges and immunities clause, limit the application of its guest statute to resident defendants.

As Dean Ely goes on in his discussion of the question of whether states have an unusual interest in protecting their own, he runs into some difficulty, because it turns out that in some instances, at least as regards the result he favors, he is willing to concede to a state a greater interest in protecting its own. In discussing the unprovided-for case, he concludes that he favors a rule that would look to the law of the situs rather than that of the forum, in essence the third rule of *Neumeier v. Kuehner*.¹⁷⁹ As in *Neumeier*, this means that since the accident involving a New York defendant and an Ontario plaintiff occurred in Ontario, Ontario law denying recovery would apply. The Ontario plaintiff would not have the benefit of New York law, which allows recovery, although, as *Babcock* holds, if a New York plaintiff were injured by a New York defendant in

178. If the defendant were from a guest statute state, there would be no conflict of laws on the issue of guest-host immunity, but the defendant would be asserting the defense under the guest statute of the defendant's home state.

179. 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972); Ely, *supra* note 19, at 206, 213-17.

Ontario, New York law allowing recovery would apply.¹⁸⁰ Currie contended that the denial of recovery to the Ontario plaintiff in these circumstances would violate the privileges and immunities clause,¹⁸¹ and Ely concedes that if he is correct in his interpretation of *Austin*, the denial of recovery here would be unconstitutional.¹⁸² As I have discussed elsewhere, I, too, think that the denial of recovery in *Neumeier* was improperly discriminatory, although I do not think that the discrimination reached constitutional dimensions.¹⁸³ In any event, Dean Ely has sanctioned a choice of law result that would allow the forum to favor its own.

Dean Ely's objection to the forum's favoring its own breaks down completely—although he tries to salvage it somewhat—when two parties from a nonrecovery state are involved in an accident in a recovery state. Here, Dean Ely favors application of the law of common domicile to deny recovery.¹⁸⁴ Let us consider how such a result relates to the forum's favoring its own. If a defendant from a nonrecovery state is involved in an accident with a recovery state plaintiff in the latter's home state, the plaintiff will bring suit in the home state, which, in this case of true conflict, will apply its own law and allow the plaintiff to recover.¹⁸⁵ When two parties from a nonrecovery state are involved in an accident in a recovery state, the plaintiff will sue in the state of injury, because if suit is brought in the home state, that state will apply its law denying recovery.¹⁸⁶

In my view, the state where the accident occurs has no real interest in applying its law to allow recovery since the consequences of the accident and of allowing or denying recovery will be felt in the parties' home state.¹⁸⁷ The different treatment of the nonresident plaintiff, who cannot recover against the nonresident defendant, and the resident plaintiff, who can, is again justified because in the latter instance the forum has a real interest in applying its law to allow recovery and in the former instance it

180. See *supra* text accompanying note 2.

181. Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1323-25 [445, 445-48] [hereinafter cited as Currie & Schreter, *Privileges and Immunities*].

182. Ely, *supra* note 19, at 211 n.94.

183. Sedler, *Interstate Accidents*, *supra* note 176.

184. Ely, *supra* note 19, at 208-09.

185. Such a case has never arisen in practice, perhaps because the result is so obvious.

186. See, e.g., *Fuerste v. Bemis*, 156 N.W.2d 831 (Iowa 1968); *DeFoor v. Lematta*, 249 Or. 116, 437 P.2d 107 (1968); *McSwain v. McSwain*, 420 Pa. 86, 215 A.2d 677 (1966).

187. See the discussion in Sedler, *Judicial Method is "Alive and Well": The Kentucky Approach to Choice of Law in Interstate Automobile Accidents*, 61 KY. L.J. 378, 382-83 (1973). Thus, I agree with Dean Ely when he says that the interest of the state of injury in applying its law to allow recovery in this situation "seem[s] speculative, at least to me, when compared with the interest of the parties' home state . . . in seeing to it that 'its' guests not collect from 'its' hosts in cases of ordinary negligence." Ely, *supra* note 19, at 208-09.

does not.¹⁸⁸ In this situation, however, a number of courts have allowed recovery, sometimes evidencing a concern for the evenhanded treatment of nonresidents.¹⁸⁹

This result, particularly when it is premised on a concern for evenhandedness, should please Dean Ely, but it does not. He favors the application of the law of the common domicile to deny recovery, although as he notes, if his interpretation of *Austin* is correct—or as he puts it, if *Austin* is “accepted as written”—the application of the law of the common domicile to deny recovery would be unconstitutional.¹⁹⁰ Dean Ely, however, concludes: “Applying the law of the common domicile when no other state is substantially interested—which means, of course, that one local will win and another will lose—seems at least in some cases, so sensible it’s hard to conclude it violates even our small c constitution.”¹⁹¹

As pointed out above, for the recovery state to deny recovery to a nonresident plaintiff against a nonresident defendant means that the recovery state is favoring its own, since if a resident plaintiff had been injured by a nonresident defendant from a nonrecovery state, the forum would apply its law enabling the resident plaintiff to recover. Dean Ely says:

[A]t least on a comparative basis, it seems less offensive to any “spirit of our constitution” to apply to a suit between two people the law of the joint domicile . . . than it does to build a choice-of-law system on the notion that each *individual* carries around with him his home state’s law, which will be presumptively applicable to his case (assuming it favors him) irrespective of whom he gets involved in litigation with.¹⁹²

Interest analysis, of course, does not mean that “each individual carries around with him his home state’s law.”¹⁹³ It means in this context that when a law reflects a compensatory or protective policy, the only state interested in applying its law to implement that policy is a party’s home state, since it is there that the consequences of allowing recovery or imposing liability will be felt. If it is sensible to apply the law of the common domicile when it is the only interested state, even though the effect is that the forum will be favoring its own, then why is it not equally sensi-

188. On this basis, Currie concluded that the forum was not improperly discriminating against the nonresident plaintiff in this situation although it would allow recovery to a resident plaintiff injured in the forum by a nonresident defendant from a nonrecovery state. Currie & Schreter, *Privileges and Immunities*, *supra* note 181, at 1366 [495].

189. See the discussion and review of cases in Sedler, *Rules*, *supra* note 4, at 1035. In my view, these decisions simply reflect the forum’s preference for its own ‘better law.’

190. Ely, *supra* note 19, at 211 n.94.

191. *Id.* at 211. By “small c constitution,” he is referring to constitutional values such as the nondiscrimination value rather than to constitutional doctrine.

192. *Id.* (emphasis in original).

193. *Id.*

ble to deny the foreign defendant the benefit of the forum's guest statute when the forum has no interest in extending such protection and when the only state interested in extending such protection—the defendant's home state—does not do so? In both instances, the forum is favoring its own, and it is not extending the benefit of its law to the nonresident party—in one case to allow recovery and in the other case to deny recovery—because it has no interest in doing so. It would seem rather irrelevant in this regard that in one case no resident party is involved and that in the other case there is a resident party. In both cases, it is the nonresident party who is being denied the benefit of the forum's law, and in both cases, the effect of such denial is that the forum is favoring its own.

It turns out, then, that Dean Ely's objection to the forum's favoring its own is somewhat undercut by his willingness, at least in some cases, to allow such a result. While he objects in theory to the proposition that a state's compensatory policies extend only to residents, he approves of results that have just that effect. He has shown no valid basis for distinguishing between the failure to extend a state's compensatory policies to nonresidents and the failure to extend a state's protective policies to nonresidents, as in the guest statute example. In both instances the reason for the refusal to extend the benefit of the forum's law to the nonresident party is the same: the forum has no real interest in doing so, but it would have such an interest if a resident party were involved. Dean Ely, then, has not only failed to demonstrate that limiting a state's compensatory and protective policies to residents is violative of the privileges and immunities clause, but he has conceded that at least sometimes it produces a sensible result.

It is abundantly clear that interest analysis is not premised on a state's interest in protecting its own. Nor does interest analysis proceed on the assumption that "states are interested in applying their rules so as to generate victories for their own people in a way that they are not interested in generating victories for others."¹⁹⁴ The basic premise of interest analysis is that choice of law decisions should be made with reference to a state's interest in applying its law in order to implement the policy reflected in that law. When the policy reflected in that law is a regulatory or admonitory one, application of the law to implement that policy frequently will result in generating a victory for a nonresident over a resident. When the policy reflected in a law is a compensatory or protective one, a state's interest in applying its law to implement that policy usually is predicated on a party's residence in that state. That interest, therefore, is necessarily absent when the party claiming the benefit of the state's law is a nonresident. If denying the nonresident the benefit of the state's

194. *Id.* at 178.

law means that the state is favoring its own, this is not because interest analysis is structurally designed to favor residents over nonresidents, but because in the particular circumstances the state has a real interest in applying its law when a resident party is involved and has no real interest in doing so when a nonresident party is involved. Interest analysis, as a basic approach to choice of law, in no way distinguishes between residents and nonresidents. Thus, Dean Ely's constitutionally-based criticism of interest analysis as an approach to choice of law has been demonstrated to be completely unwarranted.

II. INTEREST ANALYSIS IN THE REAL WORLD: AN EMPIRICAL RESPONSE TO THE 'NEW CRITICS'

In the preceding section of this article I have dealt with the 'new critics' on their own terms. I have responded to their criticisms of interest analysis as a basic approach to the resolution of conflicts problems and have tried to demonstrate that those criticisms are not well-founded. In the case of Professor McDougal, the criticism proceeds on what I believe is a mistaken view about the purpose of conflicts law in our legal system and the role of a court in deciding a conflicts case. In the case of Professor Brilmayer, the criticism simply misapprehends the nature of the interest analysis approach and the way it operates. Thus, the criticism is constructed on a completely inaccurate premise. In the case of Dean Ely, there is also a complete misunderstanding of the basic premise of interest analysis and a confusion between a state's interest in applying its law in order to implement the policy reflected in that law and the matter of a state's generating victories for its own people. He simply fails to realize that interest analysis as a basic approach to choice of law does not *structurally* distinguish between residents and nonresidents and, therefore, that a state's interest in protecting its own is no part whatsoever of interest analysis.

In the present section of this Article, I want to develop what I consider to be the strongest justification for interest analysis and the best response to the critics, new and old. That justification is an empirical one. *Interest analysis is the preferred approach to resolving conflicts problems because it works.* More than any other approach to choice of law, interest analysis facilitates the court's role in a conflicts case because it provides functionally sound and fair solutions to the choice of law issues that arise in actual cases. It is for this reason that interest analysis is the approach that is in fact applied by the courts in practice regardless of the particular modern approach that they are purportedly following.¹⁹⁵

195. For a more complete discussion of this point, see the articles cited *supra* note 5.

Interest analysis will generally produce functionally sound and fair results in practice because it simplifies the choice of law process by focusing on what the courts consider to be the most *rational* consideration in making choice of law decisions: the policies reflected in a state's rule of substantive law and a state's interest in applying its law to implement those policies in the particular case.¹⁹⁶ When an analysis of the policies and interests of the states involved reveals that only one state has a real interest in having its law applied in the particular case, it seems proper to a court, concerned with achieving a functionally sound and fair result in the particular case, to apply the law of the only interested state.¹⁹⁷ By the same token, when the forum has a real interest in applying its own law in a particular case in order to implement the policies reflected in that law and the application of the forum's law is not fundamentally unfair to the other party, applying the forum's law to advance its own policies and interests also seems to the court to produce a functionally sound and fair result. Since, as discussed previously, the courts consider their role in a conflicts case to be to achieve a functionally sound and fair result in the case before them and since it is interest analysis that best facilitates the achievement of such a result, it should not be surprising that in practice it is interest analysis that is in fact applied by the courts.

Before dealing with the results reached by the courts in practice in relation to the criticisms of interest analysis as a basic approach to choice of law, I want to say something further about the matter of governmental interests in private litigation. As I have pointed out elsewhere,¹⁹⁸ interest analysis is not intended to turn conflicts law into a public law matter. The focus of interest analysis as a basic approach to choice of law is still on the litigants who are before the court. The interest analysis approach merely means that the choice of law decision in a case involving private litigants is made with reference to the policies and interests reflected in the differing laws of the states involved. When the policy behind a state's law would be advanced by its application in the particular case, the party who would benefit from the application of the law is deemed entitled to invoke such benefit in the choice of law context. While a state as such may indeed have an interest in the outcome of litigation between private parties,¹⁹⁹ the premise of interest analysis as an approach to choice of law is *not* that the purpose of conflicts law is to advance a state's governmen-

196. See *supra* note 31.

197. See the discussion in Sedler, *Governmental Interest Approach*, *supra* note 5, at 186-87.

198. *Id.* at 191-92.

199. *Id.* This interest appears with respect to regulatory and protective laws, that are aimed at 'social engineering,' in which the state may be relying on the private persons whose interests are affected by those laws to implement the social engineering policy.

tal interest. It is, rather, that a consideration of the policies and interests of the states involved is the most rational and functionally sound method of resolving the choice of law issues that are presented in litigation between private parties.

Currie perhaps put too much emphasis in some places on the interest of the state as such in having its law applied in order to implement the policies reflected in that law. This appears particularly in regard to his argument in favor of the application of the forum's own law in the true conflicts situation. Currie contended that the court could not properly weigh interests in the case of the true conflict and said that the determination of which state had the greater interest was a political function of a very high order that should not be committed to courts in a democracy.²⁰⁰ Here, perhaps Currie somewhat overstated the case.²⁰¹ The role of the court in a conflicts case, as we have said, is to achieve a functionally sound and fair result in the case before it. Just as the court's role is not to "promote multistate policies,"²⁰² neither is its role to advance the policies and interests of the forum. A court would not be acting in a politically improper way if it adopted a solution to the true conflict other than the application of the forum's own law.²⁰³

I maintain that the forum should apply its own law in the case of the true conflict because it is *reasonable* for the forum to resolve the true conflict in this manner and because in practice the results produced by this method of resolution are functionally sound and fair to the parties. As I have stated:

In practice, courts tend to see a conflicts case as essentially a domestic case with a foreign element added; when the same reasons that call for

200. Currie, *Methods and Objectives*, *supra* note 31, at 176 [182-83].

201. It must be remembered that Currie developed interest analysis against the background of the traditional rules approach of the original Restatement, which was being followed by all courts at that time. As an advocate for a completely different approach, he understandably tended toward overstatement. His tragically early death prevented his further refinement of that approach. It is that refinement that has been undertaken by his adherents.

202. See *supra* notes 49-57 and accompanying text.

203. On this point I need to clear up some confusion that may have been generated by an earlier statement. I previously said that I advocated application of the forum's own law in the true conflict because "in a conflict case the proper function of a court is to advance its own policies and interests rather than to advance 'multistate policies.'" Sedler, *Governmental Interest Approach*, *supra* note 5, at 227. The confusion resulted from my use of the term "proper function." What I meant by "proper function," as I went on to say, was that "[i]t is clearly legitimate for a court to decide that the implementation of that policy [the policy reflected in its own law] is more important than implementation of 'multistate policies.'" *Id.* I did not mean to imply that a court would be acting improperly in any sense if it adopted a solution to the true conflict other than the application of its own law.

the application of their law in a domestic case are equally present in a conflicts case, they naturally enough want to apply their own law.²⁰⁴

In other words, whenever the forum has a real interest in applying its own law in order to implement the policy reflected in that law, applying the forum's law seems to the court to produce a functionally sound and fair result in the particular case. I also have noted that in practice, when courts have purported to apply "objective criteria" to the resolution of the true conflict, they have tended to skew the criteria to favor the application of their own law.²⁰⁵ For these reasons, I, like Currie, advocate the application of the forum's own law in the true conflict situation.²⁰⁶ In practice, the courts almost invariably do so.²⁰⁷

I want now to come back to the matter of achieving functionally sound and fair results in particular cases. Critics of interest analysis almost always focus on the alleged deficiencies in the underlying theory and use a lot of hypothetical examples to illustrate the alleged deficiencies. They rarely criticize, however, the results in actual cases. They tend to focus on the theory and say that if the theory is unsound, it does not matter what results are in fact produced by the application of interest analysis.²⁰⁸ I submit, however, that the validity of interest analysis as a basic approach to choice of law depends on the results produced by the application of the approach and that if the results are good, the 'theory' must be pretty good, too. If the courts are in fact applying interest analysis in practice—and this point has not really been disputed—and if the courts are reaching functionally sound and fair results in the cases coming before them for decision, then the validity of interest analysis as a basic approach to choice of law, I submit, has been empirically demonstrated. If that validity has been empirically demonstrated, then in the real world interest analysis must be considered the preferred approach to finding

204. *Id.* at 227.

205. *Id.* at 232.

206. It is on this point that other adherents of interest analysis, of whom Professor Weintraub is the most prominent, disagree and have proposed solutions to the true conflict other than the application of the forum's own law. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 270-76, 372-82 (2d ed. 1980). For an analysis of Weintraub's solutions in tort cases, see Seidelson, *Interest Analysis: The Quest for Perfection and the Frailties of Man*, 19 DUQ. L. REV. 207 (1981). Professor Kay, on the other hand, shares my view that in the case of the true conflict, the forum should apply its own law in order to implement the policy reflected in that law. Kay, *supra* note 14, at 614-17.

207. See Sedler, *Governmental Interest Approach*, *supra* note 5, at 231-33. For a discussion of the California Supreme Court's decision in *Offshore Rental Co. v. Continental Oil Co.*, 22 Cal. 3d 157, 583 P.2d 721, 148 Cal. Rptr. 867 (1978), to displace its own law in a true conflict, see Sedler, *Reflections*, *supra* note 9, at 1629 n.5, and works cited therein.

208. See the discussion of this point in Hay, *Reflections on Conflict-of-Laws Methodology*, 32 Hastings L.J. 1644, 1685-86 (1981).

solutions to problems that require a choice of law.

There seems to be little dispute that the courts are generally reaching functionally sound and fair results in the cases coming before them for decision. As Professor Leflar has observed:

The fact is that most American courts today are moving to what they call "the" new law of conflict of laws. It is a conglomerate, and not a bad one. In terms of location, this body of law is being lifted up by the courts to a well-watered plateau high above the sinkhole it once occupied. No location lasts forever, and there are vistas beyond the plateau, but it is a rest stop now.²⁰⁹

By functionally sound and fair results, I mean results that are acceptable in the sense that they do not produce unfairness to the litigants in the particular case and do not require the application of the law of a state in circumstances in which the application of such law would be considered objectively unreasonable. Courts can disagree about the result in a particular conflicts case, as they can disagree about the result in any other case, and there could be more than one outcome in a particular conflicts case that would be considered to be functionally sound and fair. My point is simply that the results that the courts do reach in practice, when it is clear that they are in fact applying interest analysis, are functionally sound and fair results.

I have gone through the writings of the new critics carefully to find actual cases supporting their claim that application of interest analysis produces what they consider to be an improper result. In Professor McDougal's view, the court achieves an improper result in any case in which it does not employ 'comprehensive interest analysis,' so we would not expect him to take issue with the result in a particular case more so than in any other. We would, however, expect to find such examples in the writings of Professor Brilmayer and Dean Ely. We would expect them to demonstrate that interest analysis has produced what they consider to be improper results in actual cases, but they do not do so. In fact, in both of their writings there is relatively little discussion of actual cases. Their emphasis is on the alleged theoretical deficiencies in interest analysis, and they use hypothetical cases—which have not arisen in practice and are not likely to do so—to illustrate those alleged deficiencies.

209. Leflar, *supra* note 5, at 26. Professor Leflar maintains that the courts "follow a pattern of multiple citation, seldom relying solely upon any single modern choice-of-law theory, but combining two or more of the theories to produce results which, interestingly, can be sustained under any or nearly all of the new non-mechanical approaches to conflicts law." *Id.* at 10. While the pattern of multiple citation does take place in practice, it is only the interest analysis approach that can consistently explain the results in these cases. This is why I contend that it is the interest analysis approach that the courts are in fact applying in practice.

Professor Brilmayer does discuss *Bernhard v. Harrah's Club*,²¹⁰ but only for the purpose of introducing a rather implausible variation of that case.²¹¹ She does not indicate any disagreement with the result in *Bernhard* itself. It cannot be disputed that the application of California law by the California court in that case produced a functionally sound and fair result. California had a real interest in applying its law in order to implement both the compensatory and admonitory policies reflected in that law. The application of California law was fully foreseeable to the Nevada tavern, which was close to the California border and which actively solicited California customers.²¹² Because of California's real interest in applying its own law and because of the absence of unfairness to the Nevada defendant, it was fully reasonable for California to apply its law on the issue of dram shop act liability in that case.

There is no utility in speculating on how the Nevada court would or should have decided this case because the case would never arise in Nevada. The plaintiff in such a situation would always sue in California, obtaining jurisdiction under the California long-arm act²¹³ in the quite realistic expectation that in this case of true conflict, California would apply its own law. Critics of interest analysis especially decry the view that in the case of a true conflict, each state should apply its own law, and they are looking for solutions that will produce the same result regardless of where suit is brought. I think that this concern for the same result regardless of where suit is brought is quite misplaced. In the real world, particular suits will be brought in particular states with reference to the likely choice of law and substantive result, and if the plaintiff cannot obtain jurisdiction over the defendant in a favorable forum, he may not bring suit at all.²¹⁴ Our inquiry, therefore, should focus on whether the courts reach functionally sound and fair results in the cases that actually arise in practice. Just as we should not be looking for ideal solutions to hypothetical cases that will never arise in the real world, we should not be looking for the same solutions to particular cases that will only be brought in one state. A case like *Bernhard* would only be brought in California, and the question with which we should be concerned is whether the California court reached a functionally sound and fair result in that

210. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976).

211. See the discussion *supra* notes 92-104 and accompanying text.

212. See the discussion *supra* notes 99-101 and accompanying text.

213. On the constitutionality of California's exercise of jurisdiction under its long-arm act in this situation, see *supra* note 95. The same 'foreseeability' factors that make the application of California substantive law in this case reasonable and hence constitutional also make it 'fundamentally fair' for California to exercise long-arm jurisdiction over the out-of-state defendant in this case.

214. See *supra* note 158.

case. If it is conceded that the court did and if the court was in fact applying interest analysis,²¹⁵ then *Bernhard* is a case that empirically supports the validity of interest analysis as a basic approach to choice of law.

The same empirical support is furnished by numerous other cases in which the courts in fact applied interest analysis and in which it is conceded that the courts reached a functionally sound and fair result.²¹⁶ I do not mean to suggest that some critics of interest analysis do not sometimes point to actual cases in which they contend that the application of that approach has produced an improper result.²¹⁷ My point is that, on the whole, it has not been contended that in practice the courts are reaching functionally unsound or unfair results in the cases coming before them for decision. If the courts are actually applying interest analysis to resolve the choice of law issues in these cases and if the results of such application are not being challenged, then the validity of interest analysis as a basic approach to choice of law has been empirically demonstrated.

This brings me to *Allstate Insurance Co. v. Hague*.²¹⁸ While most commentaries on *Allstate* have dealt with the constitutional significance of the case,²¹⁹ practically every commentator has disagreed with the choice of law decision of the Minnesota Supreme Court.²²⁰ Although the Minnesota Supreme Court explicitly follows Leflar's choice-influencing considerations, as it did in *Allstate*, in practice its decisions track closely the Currie version of interest analysis.²²¹ The critics of interest analysis, then, can point at least to *Allstate* as one example in which the application of interest analysis did not produce a functionally sound and fair result.

215. See the discussion of this point in Sedler, *Governmental Interest Approach*, *supra* note 5, at 233.

216. On the whole, there has been relatively little criticism of the results that the courts reach in actual cases. The criticism tends to focus on the rationale of the decisions and on the possible application of that rationale to hypothetical cases, most of which will never arise in practice.

217. The *Lilienthal* case has been the decision most criticized on this basis. See the discussion *supra* notes 49-52 and accompanying text.

218. 449 U.S. 302 (1981).

219. Two symposia on *Allstate* will be found in 10 HOFSTRA L. REV. No. 1 (1981) and 14 U.C.D. L. REV. No. 4 (1981). Other valuable commentaries are Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981); Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440 (1982).

220. In *Allstate*, Justice Stevens, while agreeing that the application of Minnesota law was not unconstitutional, gratuitously observed that he "regard[s] the Minnesota courts' decision to apply forum law as unsound as a matter of conflicts law, and there is little in this record other than the presumption in favor of the forum's own law to support that decision." 449 U.S. at 331-32 (Stevens, J., concurring).

221. The interest analysis, however, was leavened with a preference for the forum's 'better law.' See, e.g., *Milkovich v. Saari*, 295 Minn. 155, 203 N.W.2d 408 (1973). For a discussion of the Minnesota Supreme Court's decisions in conflicts torts cases, see Sedler, *Rules*, *supra* note 4, at 1007-09. In every case, the court applied Minnesota law.

To the contrary, I submit that the decision of the Minnesota Supreme Court in *Allstate* to apply Minnesota law on the issue of 'stacking' did indeed produce a functionally sound and fair result. A court achieves a functionally sound and fair result in a conflicts case when the result does not produce unfairness to the litigants in the particular case and does not produce the application of the law of a state in circumstances in which the application of such law would be considered objectively unreasonable. In *Allstate*, the application of Minnesota law on the issue of 'stacking' produced a functionally sound and fair result because: (1) Minnesota had a real interest in applying its law on this issue in order to implement the policies reflected in that law, (2) Minnesota's claim to the application of its law on this issue in the particular case was no less reasonable than Wisconsin's claim to the application of its law, and (3) the application of Minnesota law on this issue produced no unfairness to *Allstate*.

In the first place, it is important to remember that while, from a legal standpoint, the case involved a conflict between the laws of two sovereign states, the real world setting of the case was in a functional multistate area covering parts of both Minnesota and Wisconsin.²²² When people live in a functional multistate area, the state line may be *legally* real, but it is not *functionally* real in the day-to-day lives of the people living there. Functional multistate areas abound throughout the country and give rise to many conflicts cases.²²³ While Mr. Hague lived on the Wisconsin side of the state line, he drove one of the insured vehicles every working day to his place of employment on the Minnesota side of the line, and after his death his widow moved to Minnesota when she married a Minnesota resident. Precisely because Mr. Hague drove into Minnesota every working day, and doubtless made many other trips there, *it was just as probable that Mr. Hague would be involved in an automobile accident in Minnesota as it was that he would be involved in an automobile accident in Wisconsin*. There seems to be no dispute that the application of Minnesota law on the issue of 'stacking' would have been unexceptional if the particular accident in which Mr. Hague was killed had occurred in Minnesota.²²⁴ Since it was just as probable that the accident could have occurred in Minnesota, the application of Minnesota law on the 'stacking'

222. See the discussion of functional multistate areas in Sedler, *The Territorial Imperative: Automobile Accidents and the Significance of a State Line*, 9 DUQ. L. REV. 394, 399, 407-12 (1971).

223. See, e.g., *Blamey v. Brown*, 270 N.W.2d 884 (Minn. 1979), *cert. denied*, 444 U.S. 1070 (1980); *Foster v. Leggett*, 484 S.W.2d 827 (Ky. 1972); *Cipolla v. Shaposka*, 439 Pa. 563, 267 A.2d 854 (1970); *Haines v. Mid-Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970).

224. As Justice Powell observed in his dissent: "Under our precedents, it is plain that Minnesota could have applied its own law to an accident occurring within its borders." 449 U.S. at 336 (Powell, J., dissenting).

question would not appear to be unreasonable merely because the particular accident occurred on the Wisconsin side of the line rather than on the Minnesota side of the line. In other words, the application of Minnesota law on the issue of 'stacking' was foreseeable to Allstate not only because the policy covered Mr. Hague in any state where he was driving,²²⁵ but also because the application of Minnesota law on this issue was equally foreseeable with the application of Wisconsin law, since it was equally probable that Mr. Hague would be involved in an accident in either state.

Because Mr. Hague drove a vehicle into Minnesota every working day, it is reasonable for Minnesota to apply its compensatory policy in favor of Mr. Hague or his beneficiaries, just as it would be if he had been a Minnesota resident.²²⁶ This interest is not predicated on his membership in the Minnesota workforce,²²⁷ but on the fact that he was a regular user of the Minnesota highways and that the matter in issue concerned an automobile insurance policy covering the vehicles that he regularly drove into Minnesota. In addition, Minnesota's interest in applying its compensatory policy for the benefit of Mr. Hague's beneficiaries was buttressed by the widow's subsequent move to Minnesota.²²⁸ In the circumstances of this case, then, it was just as reasonable for Minnesota to assert an interest in applying its law on the 'stacking' question as it was for Wisconsin to assert such an interest. Since it was reasonable for Minnesota to assert such an interest here and since the application of Minnesota law produced no unfairness to Allstate, the application of Minnesota law in the circumstances of this particular case produced a functionally sound and fair result. Even the decision in *Allstate*, then, sometimes criticized as an extreme example of a state's preference for its own law, cannot be shown to have produced a functionally unsound or unfair result.

225. This coverage was required under the Wisconsin law regulating automobile liability insurance policies and under the corresponding laws of every other state.

226. The 'evenhandedness' of Minnesota here should be particularly pleasing to Dean Ely, in that Minnesota asserted the same interest in applying its law for the benefit of a nonresident as it did for the benefit of a resident.

227. The plurality and dissenting opinions in *Allstate* disagreed over whether Minnesota could assert a legitimate interest in applying its law on this basis. Justice Powell in dissent maintained that it was irrelevant that the insured's workplace was in Minnesota because "[n]either the nature of the insurance policy, the events related to the accident, nor the immediate question of stacking coverage are in any way affected or implicated by the insured's employment status." 449 U.S. at 339 (Powell, J., dissenting).

228. On the relevance of post occurrence changes in interest, see the discussion in Sedler, *Governmental Interest Approach*, *supra* note 5, at 236-42.

CONCLUSION

Once it is recognized that the purpose of conflicts law in our legal system is to provide functionally sound and fair solutions for those relatively few conflicts cases that arise in practice, the preferred approach to the resolution of conflicts problems should be the approach that best facilitates this purpose. For all the theoretical criticisms of interest analysis as a basic approach to choice of law, it cannot be denied that in the real world it is interest analysis that has been applied by the courts and that, in practice, the courts have generally reached functionally sound and fair results in the cases coming before them for decision. Therefore, I submit that the validity of interest analysis as a basic approach to the resolution of conflicts problems and as the preferred approach to the resolution of those problems has been empirically demonstrated. And this, I would further submit, is the unanswerable response to the critics, 'new' and 'old.'